IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SPOKANE & EASTERN TRUST COMPANY,
Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY,
Appellee,

and

CENTRAL BANK & TRUST COMPANY and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,
Defendants.

No. 3983

Appeal from District Court, Eastern District of Washington

APPELLANT'S OPENING BRIEF

F. H. GRAVES
W. G. GRAVES
B. H. KIZER,
Spokane, Washington
Solicitors for Appellant.

EMPIRE-PACIFIC PRINTING CO., SPOKANE

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SPOKANE & EASTERN TRUST COMPANY,
Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY,
Appellee,

and

CENTRAL BANK & TRUST COMPANY and E. L. FARNSWORTH, as Director of Taxation and Examination of the State of Washington,
Defendants.

No. 3983

Appeal from District Court, Eastern District of Washington

APPELLANT'S OPENING BRIEF

F. H. GRAVES
W. G. GRAVES
B. H. KIZER,
Spokane, Washington
Solicitors for Appellant.

STATEMENT OF THE CASE

The United States Steel Products Company, the appellee, was plaintiff below and will herein be called the plaintiff. Appellant, the Spokane & Eastern Trust Company, will be called the Trust Company, and its co-defendant, the Central Bank & Trust Company, will be called the Central Bank or the Bank. Where amounts are referred to they will be stated in round figures unless it may chance that the exact sum is material.

By its complaint plaintiff sought to charge the Trust Company as trustee of $47,000, the proceeds of a collection made for plaintiff by the Central Bank. Broadly stated, these are the facts involved: At the time of the transaction upon which plaintiff bases its action, the Central Bank, which is now insolvent, was a banking house at Yakima, Washington. It was rather a small bank, having a capital of but $50,000, with deposits of approximately $500,000. It was not a member of the Federal Reserve System. For several years the Trust Company, whose banking house is at Spokane, had been a correspondent of the Central Bank, the latter having an active account with it. When the deflation period began in 1920, the deposits of the Central Bank began to shrink, and it was necessary for it to obtain money from time to time from outside sources. Its principal shareholder and president was one Sikko Barghoorn, a resident of Spokane, who was a man of considerable means, con-

trolling at least one other country bank, the Colville Loan & Trust Co., and since 1908 a director of the Trust Company. As the Central Bank began to feel the pinch of deflation, Barghoorn applied to the Trust Company for financial assistance. The Trust Company loaned the Central Bank $20,000 on its note, secured by collateral, rediscounted a goodly amount of paper for it, and permitted it to overdraw from time to time; the latter, however, only in an emergency and in anticipation of a prompt covering. It may be remarked in passing that the extending of such assistance was a common occurrence during the deflation period, not only with the Trust Company but with all the large banks who were members of the Federal Reserve System. As they needed assistance the Federal Reserve extended it to them, and they in turn extended like assistance as needed to the smaller banks that were not members of the Federal Reserve System. Had it not been for this co-operation, this aid extended by the stronger to the weaker, there would have been a financial panic in 1921 which would have far surpassed that of 1893.

The Central Bank had several correspondents with which it carried active accounts; depositing cash items, borrowing money or rediscounting paper, and drawing upon the balances thus created. Its principal correspondent, however, was the Trust Company, especially during the last of 1920 and the beginning of 1921. During that period there was not a banking day passed that it did not deposit considearble sums with the Trust Company, either by the transmission

of checks, drafts and other cash items, or by the rediscounting of paper, and that it did not draw drafts in considerable amounts upon the Trust Company. It appears, indeed, that while the Central Bank had several correspondents, more than half of all the drafts it drew in settlement of its obligations were drawn upon the Trust Company.

On the 18th January, 1921, the Yakima Hardware Company remitted $47,000 to plaintiff's Seattle office by means of a check for that amount drawn upon the Yakima Trust Company. Plaintiff deposited the check with the Seattle National Bank, and that bank sent the check, together with other checks and cash items, the total amount of which exceeded $51,000, to the Central Bank for collection. The Central Bank was not a member of the Yakima clearing house association, but cleared through the Yakima Valley Bank, with which it carried a balance for clearing purposes. It received the items from the Seattle National Bank on the 21st January, and put them with other items it had for collection through the clearing house on that day, the total amount exceeding $58,000. All these items were collected, but by reason of checks drawn upon the Central Bank and presented through the clearing house on that day, the total amount received by the Yakima Valley Bank for credit to the Central Bank was but $49,000. The Yakima Valley Bank then gave the Central Bank two drafts; one for $45,000 drawn on the Bank of California at Tacoma, and the other for $3,000 drawn upon the Fidelity National Bank of Spokane. The balance, $1,500, the

Central Bank left on deposit with the Yakima Valley Bank. The Central Bank sent the two drafts, together with other cash items, the total of which was $48,500, to the Trust Company for credit to its account. At the same time it sent the Seattle National Bank a draft for $51,000, drawn upon the Trust Company, in settlement of the items the Seattle bank had sent it for collection. This draft was not presented to the Trust Company for payment until 26th January, but the Trust Company was informed on the 25th that such draft had been drawn on it. Prior drafts drawn upon it by the Central Bank had by then come in and been paid, whereby the balance of the Central Bank had been reduced to $24,000. To pay the draft it would be necessary to allow the Central Bank an overdraft of $27,000. Moreover, a number of rediscounted notes, which were secured by the guaranty or endorsement of the Central Bank, were overdue, and under the arrangement between the two banks the Trust Company had the right to charge these back to the Central Bank. After a survey of the situation and a consultation with Barghoorn, the Trust Company decided that it would not pay the draft when it was presented, and so advised him. He immediately went to Yakima to endeavor to secure assistance from the local banks, but as it was found that the Central Bank would need about $100,000 to tide it over its difficulties, he was unable to secure it. The Central Bank closed its doors on the 27th January, and the Seattle National Bank, which had refused to assume responsibility for the collection of out-of-town

items, charged the $47,000 check back to plaintiff's account. Plaintiff then brought this suit against the Trust Company, the Central Bank, and E. L. Farnsworth, the head of the State Banking Department, and as such in charge of the liquidation of the Central Bank. The theory of the suit was that the Central Bank received and collected the $47,000 check as trustee for plaintiff; that in dereliction of its duty the Central Bank sent the proceeds of the collection to the Trust Company instead of transmitting them to plaintiff; and that the Trust Company received the money with knowledge that it was a trust fund, and belonged to plaintiff. The District Court held that plaintiff was entitled to recover the amount of the check, less certain deductions, from the Trust Company, and rendered judgment accordingly. The Trust Company has brought the case here by appeal from that judgment.

SPECIFICATION OF ERRORS

There was error:

I. In holding that the allegations of the complaint were supported by the proof save with respect to the particular manner in which the check of the Yakima Hardware Company was paid.

II. In holding that the transactions between the Central Bank & Trust Company and Spokane & Eastern Trust Company were contrary to sound law and good morals.

II. In holding that the relation of trustee and

cestui que trust subsisted between the Central Bank & Trust Company and plaintiff with respect to the proceeds of the check of the Yakima Hardware Company which the Central Bank collected for plaintiff.

IV. In holding that the relation of trustee and *cestui que trust* subsisted between the Spokane & Eastern Trust Company and plaintiff.

V. In holding that the proceeds of the check aforesaid were traceable as a trust fund in the hands of either the Central Bank & Trust Company or the Spokane & Eastern Trust Company.

VI. In refusing to dismiss the action as against the Spokane & Eastern Trust Company for want of equity.

VII. In rendering a decree for any relief or in any amount in plaintiff's favor and against defendant Spokane & Eastern Trust Company.

VIII. Finally, if it be held that plaintiff was entitled to any relief against the defendant Spokane & Eastern Trust Company, then the District Court erred in not reducing the amount of the recovery by the amount of the drafts drawn upon the Spokane & Eastern Trust Company by the Central Bank & Trust Company and paid by the former prior to the time it was informed of the draft for $51,000 drawn upon it by the Central Bank & Trust Company in favor of the Seattle National Bank, and of the circumstances surrounding the drawing of such draft.

ARGUMENT

I. *The Trust Company was guilty of neither legal nor moral wrong in its relations with the Central Bank. On the contrary, it was generous to the point where generosity came in conflict with sound banking methods.*

Upon reading the above headnote, it will no doubt occur to the Court that the question whether the Trust Company dealt fairly or unfairly, generously or sordidly, with the Central Bank, can have no proper bearing upon the decision of the case. We think it has none, but it was made the basis of the decree appealed from, and so it seems desirable to deal with it before taking up the questions which are really decisive of the case.

When the Central Bank collected plaintiff's check, it intermingled the money collected with its general funds and used it in paying its general debts, a part being applied upon its debt to the Trust Company. In so doing it acted in accordance with the custom of banks and its implied contract with plaintiff. Plaintiff has no cause for complaint, and cannot recover in this action, unless it appears that because of its insolvency the Central Bank was guilty of fraud in making the collection in the usual manner, and that because thereof plaintiff may rescind its contract with the Bank, whereby it became plaintiff's debtor for the amount of the collection, and hold the Bank as trustee *ex maleficio* of the money. Necessarily, therefore,

the decisive questions in the case are whether the Central Bank was guilty of a fraud upon plaintiff, whether because of such fraud it may be held as a trustee *ex maleficio,* and whether the trust fund it received was traced into the possession of the Trust Company. Apparently those decisive questions were lost sight of and not considered by the District Judge. The rationale of his decision seems to be found in these words:

> "Much was said on the argument about the banking laws of the state, the decisions of our Supreme Court, the commingling of funds, and the relations ordinarily existing between different banks in transactions of this kind. But inasmuch as the case will doubtless go to a higher court, I will not discuss these different questions at length. Suffice it to say that after giving full consideration to the arguments of counsel and the authorities cited I am firmly convinced that under the circumstances disclosed by this record one bank should not be permitted to nurse another along in this way until it finds a favorable opportunity to seize the money of some innocent third party to square its accounts, and then abandon its nursling to the tender mercies of bank examiners and receivers. Such a course is forbidden alike by sound law and good morals."
> (Trans., 21.)

Now, the questions of whether the Central Bank perpetrated a fraud upon plaintiff, and whether because of such fraud plaintiff could rescind the contract by which the Bank became plaintiff's debtor, and hold the Bank as trustee instead, are questions of mixed law and fact. Neither the law nor the facts material to those questions were considered. The law

of the case was relegated to a higher court for decision. The facts were no further remarked on than to say that the conduct of the Trust Company in nursing the Bank along for a time and then abandoning it was contrary to sound law and good morals. What relevancy the assumed fact had to the question of whether the Central Bank was guilty of a fraud upon plaintiff is not discoverable. Quite obviously, the decision went off upon a false issue, and in consequence the issues which must be decided if the case is to be correctly decided were overlooked. However, the judgment appealed from rests upon that false foundation, and so we have thought it best to demonstrate the fairness and good faith of the Trust Company in its dealings with the Bank before taking up the decisive questions.

If one may judge from the slighting remark relative to the Trust Company nursing the Central Bank along, the District Judge was under the impression that in extending assistance to the Central Bank under the circumstances here present the Trust Company did an unusual thing, and that its action was induced by some sinister motive. Such notions are pure figments. The evidence is conclusive that the assistance was necessitated by and was given during the deflation period that followed the war inflation; that the larger and stronger banks all over the country, or at least in the extreme northwest, were required to and were extending such assistance to their weaker brethren during that period; that such action was induced by no improper motive, but by a desire to save the

credit of the country; and that the assistance which the Trust Company gave the Central Bank differed not a whit from the aid it gave other banks similarly circumstanced, save that it was, perhaps, more generous. Stevens, a State bank examiner who testified for plaintiff, said that the deflation period in Washington, Idaho and Montana began in the fall of 1920, and was at its peak about the time the Central Bank closed its doors; that it caused prices to drop, money to become scarce, and bank deposits to fall off; that all banks, except those possessing liquid securities, were forced to look to outside sources for assistance; that banks that were members of the Federal Reserve System got assistance there, while the smaller banks looked to the larger banks for aid; that during this period the Trust Company was extending liberal assistance to a large number of banks throughout the Spokane territory; that the extending of such assistance was not only done with the approval of the State banking department, but that under some circumstances it was done at the solicitation of the department; and that the department knew the Trust Company was extending assistance to the Central Bank. He did not recall the amount of loans and rediscounts to and for other banks made by the Trust Company, but knew it ran into a very large sum; perhaps one-third of its total loans. (Trans., 60-61.)

Triplett, a vice president of the Trust Company, testified that during the deflation period it was extending financial assistance in various ways to from 75 to 100 banks, located in Washington, Idaho and Mont-

ana. At the peak the amount it had out in that way was over $3,500,000. The great majority of the banks it assisted weathered the storm, but the Central Bank and some six or seven others did not; notwithstanding the assistance given them they were obliged to close their doors. (Trans., 105-107.) Speaking of the effect of the deflation upon bank deposits, the witness said that at the first of January, 1920, the deposits of the Trust Company were over $15,000,000, while at the first of January, 1921, they were about $11,000,000, and during the month went down to $9,500,000. At the first of January, 1920, country banks had on deposit with the Trust Company over $6,000,000; in the fall of that year their deposits had shrunk to less than $2,000,000. (Trans., 105.) It should be remarked that in November, 1920, the deposits of the Central Bank amounted to $665,000, on the 3rd of January to $513,000, and on the 25th to $426,000. (Trans., 83-84.) Whether deposits were reckoned in millions or hundreds of thousands, the deflation period appeared to have a uniform proportionate effect on them.

The foregoing testimony was not disputed nor in any way questioned, and it proves that the action of the Trust Company in assisting the Central Bank was not only usual during the financial crisis through which the country was passing, but was meritorious, and was approved of, if not solicited, by the State banking department, the department authorized by the laws of the State to approve of that which is sound and honest and condemn that which is unsound and

dishonest in banking methods.

But the District Court thought that the Trust Company abandoned its "nursling" as soon as it found "a favorable opportunity to seize the money of some innocent third party to square its accounts," and it is upon that supposed offense, evidently, that the decree is based. There are two very sound objections to a decree based upon such a theory. The first is that under the pleadings and evidence plaintiff cannot recover unless it has shown that the Central Bank was a trustee for plaintiff, and that a trust fund belonging to plaintiff was turned over by the Bank to the Trust Company. However unkindly the Trust Company may have treated its "nursling," that fact has no bearing on those questions. The second is that the assumed facts are pure fancies. There was neither abandonment of the "nursling" nor seizure of any third party's money. What occurred was that the Trust Company refused to permit the Central Bank to overdraw its account some $27,000, believing such an overdraft under the circumstances to be contrary to sound banking. There was no abandonment, for, as we shall point out later, the Trust Company was willing to continue its assistance under conditions that would insure it against loss. It was justified, both legally and morally, in refusing to take chances in its operations. The country was passing through a critical period financially, and it behooved every bank to adhere strictly to sound banking methods. The Trust Company was assisting from 75 to 100 banks, any one of which had as good a claim upon it as any other.

Its outlay for that purpose was over $3,500,000. In a year's time it had lost $6,000,000 in deposits. On account of those two things alone, then, it had been required to pay out $9,500,000 in money. In addition the banking laws of the State required it to maintain a cash reserve of 15% of its total deposits, and, necessarily, it had to keep itself in such a condition that it could supply the pecuniary needs of its local customers. Its primary obligation, of course, was to its own depositors, and it could justify no action that might, by any possibility, imperil its solvency. Unquestionably it could have advanced the additional $100,000 or more which might have been needed to carry the Central Bank through, and its solvency would not have been impaired although the whole amount had been lost. But no more morally than legally could it be expected to do so. The aggregate of all the demands upon it must be considered in determining how far it ought, in good conscience, to have gone in assisting the Central Bank, and what risks of loss it ought to have taken. The Bank had no better claim upon it than any other country bank, or local customer, who looked to it for assistance from time to time, and it could not properly extend assistance to the Bank which it would not, under similar circumstances, have extended to them. The Bank already owed it $185,000 to $190,000 on direct obligations or guaranties or endorsements of rediscounted paper. A goodly amount of the rediscounted paper was overdue, and under the arrangement between the two banks it could have been charged back to the Bank.

This had not been done because, toward the last, the Trust Company saw no prospect of getting anything better in its stead. The Trust Company was strongly opposed to overdrafts, but nevertheless the account of the Bank was overdrawn, in fluctuating amounts, during the greater part of January. The Bank was slow, especially toward the latter part of the month, in covering the overdrafts, and some of the paper it sent on for that purpose did not appear to be desirable. When the Bank drew the $51,000 draft on the 21st, it made no preparation for covering the heavy overdraft which it knew would result if the draft were paid, nor did it take the precaution to ascertain beforehand whether the Trust Company would permit the overdraft. It was not until the 25th, one day before the draft was presented, that the Trust Company was informed of it. Even then no paper was sent on to cover the overdraft which would result if the draft were paid, nor were there any assurances or promises that it would be promptly covered. On the contrary, the letter which advised the Trust Company of the draft suggested that it might be called upon to advance $50,000 more on paper of a slow nature, and possibly to permit the substitution of "a poorer class of security" for that which it already held. (Trans., 230.) It was because of those conditions that the Trust Company declined to allow the overdraft. (Trans., 113-114.) Adhering to sound banking methods it could not do otherwise. It was willing to continue its assistance to the Central Bank, but only upon condition that it should not be exposed to

loss in doing so. The drawing of the $51,000 draft upon it was, in effect, an attempt to exact a forced loan upon the Bank's own terms. Permission was not sought to make the overdraft, no preparation was made for covering it, the Trust Company was not informed until the day before the draft was presented that such an overdraft was desired. It was placed in a situation where it was required to decide almost immediately whether it would pay the draft and trust to the good will and ability of the Bank to cover the overdraft that would be created, or would dishonor it. Morally as well as legally it was in the right in refusing to be hurried into a $27,000 loan of the safety of which it was not sure.

The District Judge rejected these very apparent reasons for refusing to permit the overdraft in favor of a secret, sordid motive; the opportunity thereby afforded the Trust Company to seize the $48,000 remittance. It is manifest that the evidence was forgotten or overlooked else such a conclusion would not have been reached. One whose purpose is the seizure of money without regard to others' rights may be depended on to make the seizure when the largest amount of money is obtainable. If the Trust Company can be considered to have seized the money in question, it could have got twice as much as it did by making the seizure two or three days earlier. The $48,000 remittance was received and credited to the account of the Bank on the 22nd. The credit extinguished an existing overdraft and gave the Bank a balance of $38,000. During the next two or three

days smaller remittances, and some notes for rediscount, the whole amounting to $5,000 or $10,000, were received and credited to the Bank. During the same period, however, a number of drafts, one for $17,000, drawn by the Bank upon the Trust Company, were presented and paid, so that on the 25th, when the Trust Company decided that it would not pay the draft, the Bank had a balance of but $24,000. (Trans., 111-112, 119.) If the Trust Company was animated solely by sordid motives, its purpose being to seize all the money it could, it is evident that as soon as the $48,000 was received it would have been applied upon the Bank's indebtedness, that the same use would have been made of the smaller remittances received during the next few days, and that no drafts would have been paid. Had that course been pursued the Trust Company would have obtained $40,000 to $50,000 instead of the $24,000 it did get. That it was not pursued is in itself sufficient to prove how wrong the District Court was in the conclusion it reached concerning the transaction.

There are other circumstances which equally relieve the Trust Company from the imputation of sordidness and prove it to have acted in entire good faith. Early in the transactions between the two banks, the Central Bank pledged $20,000 in Liberty Bonds to secure a note it gave the Trust Company. In the latter part of January, when the Bank began to have difficulty in keeping up its cash reserve, the Trust Company permitted the Bank to withdraw the bonds, sell them, and use the proceeds for building up its

reserve. In lieu of the bonds the Trust Company received slow notes as security, many of which were not paid at the time of the trial. (Trans., 107, 118, 136-138.) The exact date of the substitution was not fixed by the evidence, but it was evidently about the 21st. (Trans., 227-228.) It does not need remark that if seizing money was the governing motive of the Trust Company in its dealings with the Bank, it would never have relaxed its grip upon anything so like money as Liberty bonds.

The generous attitude of the Trust Company is exemplified by an incident which occurred just before the Central Bank closed its doors. Stevens, a State bank examiner, reached Yakima for the purpose of examining the Bank on the morning of the 26th. He knew of the outstanding draft for $51,000, and that the Trust Company would not pay it. When he looked at the Bank's balance sheet he saw steps would need be taken immediately to provide money to pay the draft, and he called the bankers of Yakima in conference upon the means for raising the money. They agreed to advance certain sums, enough to take care of the draft but not to permanently relieve the Bank's cash shortage. He then called up the Trust Company and the Bank's correspondent at Seattle to ask them to help. The Seattle bank promised to do something but would not commit itself to anything definite. The Trust Company agreed to advance $15,000. As the Yakima bankers went more thoroughly into the assets of the Bank, they concluded that more money would be needed to relieve its em-

barrassment, probably as much as $100,000, and the examiner called up the Trust Company again to ask it to increase the amount it would advance. It then agreed to advance $20,000. (Trans., 57-58.) Nothing came of this, for the Yakima bankers offers of assistance "petered out," as the examiner expressed it, and the Bank was obliged to close. But the good faith of the Trust Company's offer cannot be questioned and it permits no doubt that throughout its motives were of the best, and that it was willing to do all it safely could to keep the Bank going.

Furthermore, no reason is discoverable for the anxiety of the Trust Company to "square its accounts" which is imputed to it. It need never have permitted the Central Bank to get in its debt, and it was at liberty to refuse further advances whenever it thought the debt was growing too large or the security poor. Early in January the debt was but $142,000, for which, among other securities, it held $20,000 in Liberty bonds. At one time during the month the debt went as high as $212,000, and on the 25th, before the overdue rediscounted notes were charged back to the Bank, it amounted to $185,000 or $190,000. (Trans., 118, 136.) And although the debt was increasing, the Trust Company, for the accommodation of the Bank and to enable it to maintain its cash reserve, permitted the withdrawal of the Liberty bonds and took slow notes in their stead. When the Trust Company had all along been so liberal in its dealings with the Bank, permitting the debt to increase and the security to become impaired, it is unreasonable to assume that

it all at once became obsessed with a mad desire to "square accounts" with the Bank, and was willing to cause its failure in order to get $24,000 in money.

We think, however, that the most complete refutation of the view adopted by the District Judge is found in a number of letters which were introduced in evidence by plaintiff. These passed between Triplett, a vice president of the Trust Company who had charge of its transactions with country banks, and Buckholtz, an employe of the Central Bank. Of Buckholtz' connection with the Central Bank we shall have more to say under subsequent heads. It suffices for present purposes that he was a young man who had been an employe of the Trust Company for several years, and was highly esteemed by its officers. The State banking department disapproved of Ellis, the cashier of the Central Bank, who, by reason of the non-residence of Barghoorn, its president, was virtually its manager. Barghoorn had agreed to get a man to take Ellis' place, and asked the officers of the Trust Company to recommend some one for the position. They recommended Buckholtz, and Barghoorn employed him to go to Yakima, familarize himself with the Bank's operations, and, if he proved efficient, to succeed Ellis as soon as the change could be made without causing trouble. Buckholtz went to Yakima on the 6th January. No official position was given him, but he was put in charge of the credit department, the position he had occupied with the Trust Company. His principal duties were to restrict the making of new loans and enforce collection of old ones; mat-

ters in which Ellis was very lax. Along with these duties he was authorized to select from the paper of the Central Bank such as he thought would be eligible for rediscount with the Trust Company, get information concerning it which would enable the Trust Company to pass upon its eligibility, and forward it to the Trust Company as the Central Bank needed to raise money by rediscounting. While Triplett had been his superior in the Trust Company, and was evidently an older man, they were on very friendly and intimate terms, addressing each other generally as "Dear Trip" and "Dear Buck." The letters on both sides were very frank and aboveboard, it being apparent that the writers expressed themselves freely and without reserve upon the topics under discussion. The matters dealt with principally related to paper offered for rediscount and rediscounted paper that was falling due, but Buckholtz also wrote freely of conditions as he found them in Yakima and in the Central Bank. Prices were falling, farmers would not sell their produce or sold at a loss, and wanted the banks to carry them until conditions got better. Ellis was disposed to yield to such pressure, granted renewals readily and was lax in enforcing collections, and Buckholtz found it difficult to inject the desired stiffening into the credit operations of the Central Bank. To such letters the officers of the Trust Company, principally Triplett but once or twice Mr. Rutter, its president, replied quite fully, expressing their view of the financial situation generally, and the necessity for firmness in enforcing collections and restricting credit.

There are too many of these letters and they are of too great length to permit of reference to them separately. But speaking of them generally, they establish beyond question that while the writers felt that the Central Bank had been too lenient in extending credit and enforcing collections, nothing was needed but more firmness in such matters and some temporary assistance, such as the Trust Company was extending, to tide it over the deflation period. That the Trust Company intended to extend such assistance its officers' letters leave no doubt. In illustration, Buckohltz wrote Mr. Rutter on the 9th January that the withdrawals (of deposits) had ceased, and that if the (farm) products would sell at all at reasonable figures he was confident "that we can get by and liquidate our indebtedness within 90 days." Trans., 148.) Under date of the 10th Mr. Rutter replied, congratulating Buckholtz on the "strong position" he was taking, but cautioning him that banks were passing through a troubled period and firmness in making collections was essential. Of the attitude of the Trust Company it was said: "If your hypothesis is correct there is no question but what we will do our part." (Trans., 53.)

Under date of the 20th January Triplett wrote Buckholtz concerning a particular loan, advising stringent measures to make the borrower pay, and ending in this wise with respect to the general situation:

> "Messrs. Ellis and Barghoorn both seem to feel that if you put on the pressure too hard the borrowers will begin to talk about the bank, and to

some extent we feel they are right—but on the other hand, fear is about the worst thing in the world. It causes a man to neglect his business and to almost crawl into a hole and pull the hole in after him. The fellow who goes on about his business and does what is right, having the diplomacy of which we well know you are possessed, is bound to come out on top, and I have not the slightest idea but that you can pull things out along those lines."

(Trans., 202.)

On the same day Triplett also wrote him as follows:

"I want to again impress upon you the necessity of keeping right on top of these borrowers and not letting them get away from you. We have had so much grief this year that we have come to realize that no dependence can be put in either the market or the predictions of the borrowers. They are all optimistic and seem to feel that as soon as spring opens up things will begin to move, while, as a matter of fact, there is nothing in sight to verify their predictions. Money is tighter than ever, is hard to get; people are not buying anything unless they have to, and that includes food stuff as well as clothing, and we do not look for any decided movement until prices stabilize somewhere, and the stabilization point has not yet been reached. Things may hang around a given point for a few days, but everything is on the down grade and they will go a good deal lower before they come back to any kind of normal basis. Prices have been abnormally high, and they must go sub-normally low before finally adjusting themselves.

* * * * * * *

Your account is overdrawn tonight $7,726.10, and the big Seattle check has not shown up yet. It looks like you will have to pass along a few

more rediscounts."
(Trans., 204-205.)

The "big Seattle check" was the draft to the Seattle National Bank for $17,700 which was referred to in Buckholtz' letter of the 19th. (Trans., 198.)

On the 21st Triplett wrote in three different letters:

"Your account has been credited with $4,411.42 to cover the proceeds of the rediscounts sent in your letter of January 20.

They look better than the average run of notes, and we believe you will be able to work them out. We are not concerned much about Barney, as he seems to have plenty of assets and to be a mighty good customer."

* * * * * * *

"As requested, we are using the notes of B. L. Chaney $1,000 and S. L. Allen $1,934.20 as collateral to your loans in place of the Wapato Construction note $2,500.

* * * * * * *

We could be arrested for what we think of the Allen note. While on paper it sounds good, his statement shows a net worth of such a small amount as compared to what he owes that he seems hopelessly lost in the shuffle. However, for the reason that it has to be done, we are making the substitution for you. Mr. Allen may be able to pay out of his 1921 crop, but all of you fellows who are connected with the Central Bank & Trust Company had better get right down on your knees and start to praying that everything will run along right, or I fear you will never get the money."

* * * * * * *

"Your account has been credited with $10,622.16 to cover the proceeds of the rediscounts sent in your letter of January 19. You have been charged $4,752.48 to retire the note of

Jerome Lewis, renewal of which was enclosed to you.

* * * * * * *

As to Jerome Lewis—it is one of those things that may take a long time to work out. Under ordinary circumstances we would not be favorable to making such a loan because things are too uncertain, but for the good of your bank the Executive Committee passed it through."

(Trans., 207-209.)

Under date of the 21st Buckholtz wrote a long letter on general conditions in Yakima and in the Central Bank. The effect of it was that all the Yakima banks were carrying a heavy load, but that all were confident "of a good washing out of stuff during the next 90 days" through the sale of farm produce. In the meantime, Buckholtz said, it was going to be difficult for the Central Bank to keep up its cash reserve. He thought that to do so it would be necessary for the Bank to retain collections on hypothecated paper which it made, and to send the Trust Company other paper in lieu of the money. The effect of this, he recognized, would be that the Trust Company would get more and more undesirable paper; in other words, paper which would probably not be paid before the 1921 crops were marketed. The only other way he saw to keep up the Bank's cash reserve was to arrange "the Liberty bond loan in Seattle as we have done with you," *i. e.*, get "Herb" (Herbert Witherspoon, vice president of the National City Bank of Seattle, a bank which had been extending assistance to the Central Bank along the same lines as the Trust Company, albeit not so liberally (Trans., 89), to surrender

the Liberty bonds he held as collateral so they might be sold, and take real estate contracts and mortgages in lieu of them. He closed by saying that "unless you insist, we will continue to hold what few pennies we might collect on your collateral notes and substitute other stuff, which I hope you will O. K. for the present." (Trans., 219-222.)

To this Triplett, writing under date of the 24th (the day before the apocryphal seizure of plaintiff's money), demurred. He foresaw that this would result in the Trust Company's collateral getting "more and more shoddy as time goes on." He thought "Herb" ought to be willing to help the Central Bank out in the manner suggested, and requested Buckholtz to immediately get in touch with "Herb" and ascertain if the latter would not buy the Liberty bonds, which would give the Central Bank $30,000 in money, and accept notes and mortgages as security in their stead. There was, however, no flat refusal to comply with Buckholtz' request in the event that "Herb" proved obdurate. On the contrary, Triplett said that if "he will not do that, get him to purchase the Liberty bonds and send us your note for $30,000 collateralled by one and one-half to one of 'good but slow' paper. What I mean by that, is paper which although it will ultimately be paid cannot be liquidated from so-called quick assets." Expressing the feeling of the Trust Company with respect to continued assistance, it was said:

> "We are willing and ready to stand back of the institution to a reasonable extent, but feel in

so doing we should have a class of paper which will prevent any loss on our part. Many of the notes we have taken on are not up to our regular standard, and it was only because of your judgment after investigating at close range that we were willing to take them. Naturally, we do not want to take any more uncertain paper if it can be helped.

* * * * * * *

It is one thing for us to get behind the bank and another thing for us to take a loss on it. Deposits are bound to slump, but we do not want to be in a position of having to pay them off at a sacrifice to our stockholders.

I mention these things so you will understand that while our feeling is the most friendly in the world and we are willing to do everything we can as long as the stuff is reasonably good, we do not want to get into the position where we will ultimately lose anything."

(Trans. 224-226.)

This last letter was written two days after the receipt of the $48,000 remittance. It is evident that it, at least, was not read by the District Judge. The money which he thought the Trust Company was only waiting "a favorable opportunity to seize" was already in its hands. It did not desire to put any more money into "good but slow" paper; all banks were at that time too much loaded down with that commodity. It had already complained of the character of some of the paper the Central Bank offered for rediscount, although it was accepted in order to aid the Bank. And yet, with the $48,000 in its hands, it was not ready to "abandon its nursling to the tender mercies of bank examiners and receivers," but instead offered to take on an additional load of $30,000 if it was

necessary that it should do so, provided that it was furnished with collateral which was reasonably good, however slow. The generosity of the tone of this letter, and the sincere desire of the Trust Company to continue its assistance if it could be made reasonably safe in doing so, are unquestionable. Entertaining the high opinion that we do of the District Judge, we are forced to the conclusion that he read none of this correspondence; most certainly not this last letter.

Probably this letter will be made the text for questioning the sincerity of the reasons given by the Trust Company for refusing to permit the overdraft, and it will be asked why it was that if the Trust Company was willing on the 24th to make an additional loan of $30,000, it should have refused on the 25th to permit an overdraft of $27,000. Slight consideration furnishes several obvious answers to the question. The first is found in the provision of the State banking code that "Every transfer of its property or assets by any bank * * * made in contemplation of insolvency, or after it shall have become insolvent within the meaning of this act, with a view to the preference of one creditor over another, or to prevent the equal distribution of its property and assets among its creditors, shall be void." Session Laws 1917, pp. 298-99, Remington's Comp. Statutes 1922, §3262. In view of this statute, it is apparent that if the Central Bank was insolvent, and the Trust Company had reason to believe that it was so, yet permitted it to overdraw, afterward getting securities to cover the overdraft, such securities could be recovered by the liquid-

ator of the Bank if its doors were subsequently closed. Now on the morning of the 25th Mr. Rutter received a very pessimistic letter from Buckholtz relating to the Bank's affairs. It appeared from it that unless conditions changed for the better soon the Bank would be in serious difficulty. While Buckholtz spoke of several avenues by means of which the Bank might extricate itself from its difficulties, he said that if all these failed "it sifts itself down to whether you desire by all means to keep this institution open by all possible means, depending more or less on Mr. Barghoorn's personal credit, or whether you have set a limit as to how far you will go." He told of the $51,000 draft that had been sent the Seattle National Bank, said that if it was paid "the overdraft created will be the limit to date of credit advanced this institution," but that "if you do not pay it, we are gone." (Trans., 227-232.) Here, certainly, was food for thought, and the situation received thought. The executive committee met, Mr. Graves, the attorney for and one of the directors of the Trust Company, was called into consultation, and it was finally decided not to pay the draft. (Trans., 122.) Ascribing to Mr. Graves ordinary knowledge of the law and ordinary caution in dealing with situations where large sums were involved, it must be assumed that he advised the executive committee that the letter put the Trust Company upon inquiry concerning the solvency of the Central Bank; that if it was insolvent, and the Trust Company allowed the overdraft, afterward taking securities to cover it, the securities could be recovered

by the liquidator of the Bank if its doors were subsequently closed. The committee, confronted with the alternatives of refusing to allow the overdraft, keeping the Bank open at whatever cost, or losing the securities it received to cover the overdraft in the event of the Bank's failure, prudently chose the first.

Other equally obvious answers are these: There is a vast difference between permitting one to overdraw, trusting to his ability and good disposition to afterward give adequate security therefor, and making a loan upon security which must be submitted and approved beforehand. The Central Bank had been making overdrafts and subsequently covering them with unsatisfactory paper, and the Trust Company did not desire to experiment on so large a scale.

Under the arrangement proposed in the letter, the Central Bank would have got $30,000 in cash without increasing its indebtedness one dollar. It owed the National City Bank $30,000, the debt being secured by a pledge of $30,000 in Liberty bonds. The proposal was that the Trust Company would take over the National City Bank debt, accepting as security therefor "good but slow" paper, and thus release for sale the bonds which were pledged to the National City Bank. If the overdraft had been permitted the Central Bank would still have owed $30,000 to the National City Bank, and would have increased its indebtedness to the Trust Company by $27,000. The amount which a debtor owes affects his ability to pay, and the Trust Company might well be willing to take

on an additional burden of $30,000 if thereby a debt of that amount which the Central Bank owed to another creditor was paid, but be utterly unwilling to assume the added burden if it meant an increase of so much in the total indebtedness of the Bank.

It should be remarked that overdrafts have always been frowned on, by courts as well as by banks. It has been held that allowing an overdraft was a misapplication of a bank's funds, and that a cashier could not justify his allowance of an overdraft by the plea that it was authorized by the board of directors. *Minor vs. Mechanics' Bank,* 1 Pet. 46, 71. Though the practice of paying overdrafts has prevailed to some extent, it is one that should not be sanctioned, for "it has no authority in sound usage or in law." *Lancaster Bank vs. Woodward,* 18 Pa. St., 357. "The bank had no legal right to permit the drawer to overdraw and pay his check out of the funds of other depositors, or the money of the stockholders." *Culver vs. Marks* (Ind.), 23 N. E., 1086, 1089.

There was, manifestly, sound reason, not whim or improper motive, behind the distinction which the Trust Company made between making a loan, secured by collateral, to the Central Bank, and permitting the latter to overdraw.

Something will be attempted to be made, no doubt, of the fact that the account of the Central Bank was frequenly overdrawn during January, and that in some instances the overdraft apparently exceeded that which would have resulted had the $51,000 draft been paid.

The amounts of these overdrafts, as put in evidence by plaintiff, were taken from the books of the Central Bank, and do not prove that the Trust Company actually permitted an overdraft of the amount shown on the Bank's books. The books of the Trust Company and the Bank never corresponded with respect to their balances on a given day; there might be a discrepancy of $25,000 to $50,000 between them. If the Bank on, say, the 7th, drew drafts upon the Trust Company aggregating $50,000, an entry would be immediately made on the Bank's books debiting the Bank and crediting the Trust Company with their amount. If the Bank then had no balance with the Trust Company, the Bank's books would show a $50,000 overdraft. However, the drafts might not be presented for several days or a week or two, and before they were presented the Bank might have made remittances sufficient to cover them, so that in fact there would never have been any overdraft, albeit one was shown for a time on the books of the Bank. (Trans., 43.) An apt illustration appears from the books of the Bank during its last days. They showed from the 22nd to the 27th an overdraft running from $13,000 to $56,000. (Trans., 87.) The books of the Trust Company showed that for the same period the Bank had a balance running from a few hundred dollars to $38,000. (Trans., 111-112.)

But let that pass. With the exception of the overdrafts which were erroneously shown to have existed between the 22nd and 27th, the books of the Central Bank showed no large overdrafts except from the 3d

to the 7th. (Trans., 87.) At that time, however, the Bank's rediscounts amounted to only $115,000, while from the 22nd to the 24th its rediscounts amounted to $190,000. (Trans., 85.) Furthermore, the credit of the Bank was much better during the first part of the month than it was towards the last. The continued shrinkage in deposits, the difficulty it was experiencing in keeping up its cash reserve, and the unsatisfactory paper it was asking the Trust Company to accept for rediscount and to cover overdrafts, necessarily induced caution on the part of the Trust Company in the extension of credit. Obviously, conditions from the 3d to the 7th were so different from what they were from the 22nd to the 27th, that the allowance of an overdraft during the first period would be no criterion by which to determine whether it could prudently have been allowed during the second period.

The offer of the Trust Company, in response to the application made to it by the bank examiner on the 26th, to donate $15,000 to $20,000 to a fund to keep the Central Bank open, may be invoked to cast doubt upon the sincerity of the reasons given for refusing to allow the overdraft. It can have no such effect. While called a donation it would not, of course, have been that, for if the Bank had been rescued and restored to solvency, it would have been obligated to repay all the money advanced to it to effect that result. But had it been an out-and-out donation the Trust Company could well afford to have made it. It would have joined a number of other banks in making up a fund large enough to relieve the Bank from its

present embarrassment not only, but to recoup its losses and put it firmly on its feet, so it would need no further assistance. Had the Trust Company allowed the overdraft, the only effect would have been to relieve the present embarrassment of the Bank, still leaving to the Trust Company, unaided, the burden of carrying the Bank through the deflation period, or else bringing on the same crisis later by refusing assistance. Furthermore, the Bank owed the Trust Company on notes and guaranties of rediscounted paper $162,000; not counting the rediscounts charged back on the 25th, $185,000 to $190,000. (Trans., 136.) If the Bank's losses were recouped by means of the proposed fund, so that it was restored to solvency, the Trust Company would be sure of collecting the debt owing it, otherwise it would have to depend solely upon the solvency of the makers of the paper that it held. The Trust Company was not any too well informed concerning their solvency; indeed, by reference to the Triplett-Buckholtz correspondence it will be seen that it entertained considerable doubt of the solvency of some of them. If it could be made safe on the existing debt, and be relieved from further requests for assistance, it could have well afforded to give, unrestrictedly, $15,000 to $20,000.

Mayhap facetiousness will be indulged in because of the desire expressed in the letter to aid the Central Bank, coupled with the statement that in doing so the Trust Company did not intend to be put in a position where it would sustain a loss. A bank official who felt any other way, especially in a time of

financial distress, should be promptly removed for incompetence, if not dishonesty. He, more than any other, must put justice before generosity. The money he loans is not his but belongs to the depositors in his bank, with remainder over, if any there be, to its shareholders. In a year's time the Trust Company had lost $6,000,000 in deposits. That meant, of course, that it had to keep its cash reserve intact and collect $6,000,000 from its borrowers in order to pay off its withdrawing depositors. In addition it had loaned or otherwise supplied to smaller banks over $3,500,000 and must have had loans to its customers in a much larger amount, for the bank examiner estimated that its loans to banks were about one-third of its total loans. Its officers would have been insane if in every loan they made they had not proceeded on the principle that the bank should not be put in a position where it would sustain loss.

We are impelled to the conclusion that in this case the fine judicial balance of the District Judge failed him, and that he permitted suspicion to take the place of the preponderance of evidence that is needed to sustain his harsh decision. An almost parallel case is found in *Dunlap vs. Seattle National Bank,* 93 Wash., 568, 161 Pac., 364. A trustee in bankruptcy of an insolvent bank brought suit against one of its correspondent banks, alleging that the two banks had conspired to defraud by the correspondent bank advancing money to the insolvent to enable it to keep its doors open and obtain deposits, the deposits being then turned over to the correspondent bank and applied

upon the indebtedness of the insolvent bank to it; it being alleged that more than $200,000 was thus received by the correspondent bank. The only evidence to sustain these allegations was that the insolvent bank was hopelessly insolvent; that the condition of the insolvent bank had been a matter of concern to the correspondent, which knew that if it did not advance money from time to time to the latter it would be obliged to close its doors; that the correspondent did loan the insolvent large sums of money, whereby the latter was enabled to keep its doors open and receive deposits in considerable amounts, much of which was deposited with the correspondent and reduced the indebtedness of the insolvent to it; and that as soon as the correspondent declined to extend further assistance the insolvent was forced to close its doors. It was held that the evidence was insufficient to sustain the allegations of the complaint, the Court saying:

> "The plaintiff, in support of his charge, does not rely upon positive testimony, but upon circumstances, claiming that these establish the charge as made. Fraud cannot be inferred from facts and circumstances lawful in themselves and consistent with an honest purpose. If, when all the facts and circumstances are taken together, they are consistent with an honest intent, proof of fraud is wanting.
>
> In *Foster vs. McAlester*, 114 Fed., 145, the circuit court for the eighth circuit, said:
>
> 'Fraud cannot be inferred either by the court or jury from acts legal in themselves, and consistent with an honest purpose. The settled rule on this subject is that slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no cer-

> tain results, are not sufficient to establish fraud. They must not be, when taken together and aggregated—when interlinked and put in proper relation to each other—consistent with an honest intent. If they are, the proof of fraud is wanting'."

We would paint no halo around the Trust Company. Undoubtedly business, not sentiment, dominated its relations with the Central Bank. It assisted the Central Bank just as it did many other banks: for business reasons. It did not intend to throw its money away, and expected to continue its assistance only so long as it was reasonably safe in doing so. No one would expect a bank, especially during a financial crisis, to do otherwise. But we challenge plaintiff to indicate a shred of evidence tending to convict it of dishonesty or unfairness. No improper motive can be suggested for it beginning the task of aiding the Central Bank during the financial depression. Certainly no such motive influenced it to continue the task while the demands of the Bank increased and the security it had to offer became poorer in quality. The discontinuance of the assistance was as free from taint. Justice to its depositors, justice to its shareholders, justice to the many other small banks which were depending on it for assistance, forbade that the Trust Company should advance money to the Bank when the latter was disinclined or unable to give adequate security therefor. Had its refusal to allow the heavy overdraft which the Central Bank attempted to fasten on it been prompted by unfairness or sordidness, it would not, just a few days before, have per-

mitted the Bank to withdraw $20,000 in Liberty bonds and substitute inferior security therefor; it would not, the day before, have offered to take over the $30,000 debt to the Seattle bank if "good but slow" paper was given it as security, so that $30,000 in Liberty bonds might be released to the Bank for sale; and it would not, the day after, have offered to contribute $15,000 to $20,000 to a fund which should be sufficient to relieve the Bank from its embarrassment. Most assuredly if its refusal to pay the $51,000 draft was animated by its desire to get some money to apply on the Bank's indebtedness to it, the money would have been taken and applied when it came in, several days before, and not after it had been reduced by more than half by the payment of drafts drawn by the Bank. The evidence permits no other conclusion than that the Trust Company began and continued its assistance to the Central Bank for sound and legitimate business reasons, and that for the same reasons it refused to allow the heavy overdraft which payment of the $51,000 draft would have created. Any notion that the Trust Company nursed the Bank along and finally abandoned it for an improper purpose is the product of sheer, stark suspicion, and is conclusively refuted by the evidence.

II. *The relation between the Central Bank and plaintiff was that of debtor and creditor, and consequently the money which plaintiff seeks to recover was not a trust fund to which it is entitled.*

The Trust Company can only be held liable on the

theory that the Central Bank collected plaintiff's check and held its proceeds as trustee for plaintiff, and that the trust fund thus created was wrongfully turned over to the Trust Company. The evidence establishes that the Central Bank was not plaintiff's trustee for the proceeds of the collection but merely its debtor therefor. That being the case, the money which the Central Bank remitted to the Trust Company on the 21st belonged to the Bank, the Trust Company was at liberty to pay it out on the drafts or apply it on the indebtedness of the Bank, and plaintiff cannot follow and reclaim it.

This is what occurred with respect to the collection of the check: Plaintiff deposited it with the Seattle National Bank, and the latter sent it, together with a number of other checks drawn on Yakima banks, the total of which exceeded $51,000, to the Central Bank for collection. The Central Bank was not a member of the Yakima clearing house, but availed itself of the clearing house facilities by clearing through the Yakima Valley Bank, a member bank. On the morning of the 21st, the date it received the items for collection from the Seattle National Bank, the Central Bank placed those items, together with a number of other checks drawn upon Yakima banks which it held, the total amount exceeding $58,000, with the Yakima Valley Bank for collection through the clearing house. The procedure in collecting through the clearing house was described, though not very clearly, by the witness Lemon. (Tras., 35-40.) Enough appears, however, to show that the Yakima clearing house was of the

usual clearing house type, and afforded a means for the common presentment and exchange of checks and similar obligations held by each member of the association against every other member, and a settlement of the resulting differences in their accounts against each other. 7 Corpus Juris, 896. The usual clearing house procedure is substantially as follows:

> "In practical operation it is a place where the representatives of all the national banks in this city meet, and, under the supervision of a competent committee or officer selected by the associated banks, settle their accounts with each other, and make and receive payment of balances, and so "clear" the transactions of the day for which the settlement is made. These payments may be made in cash or by such form of acknowledgment or certificate as the associated banks may agree to use in their dealings with each other as the equivalent or representative of cash."
> *Crane vs. Fourth St. Bank* (Pa.), 34 Atl., 296.

For an epitome of the rules and procedure of the Seattle clearing house, doubtless a typical association in the State of Washington, and of the conditions upon which a non-member bank may avail itself of the advantages of the association, see *Moore vs. American Sav. Bank,* 111 Wash., 148, 189 Pac., 1010. Concerning non-member banks generally, see 7 Corpus Juris, 899.

Resuming the narrative, apparently all the items presented by the Central Bank through the clearing house on the 21st were paid. However, checks aggregating some $9,000, drawn upon it and held by other Yakima banks, were presented through the clear-

ing house on the same day, so that as a result of the day's clearings the Yakima Valley Bank received but $49,500 for the Central Bank. Of this amount, $1,500 was left on deposit with the Yakima Valley Bank, and $48,000 was sent to the Trust Company for credit to the account of the Central Bank. In settlement of the collections received from the Seattle National Bank, the Central Bank sent it a draft for $51,000, drawn upon the Trust Company. This draft was received and presented for payment in due course, presentment being made and payment refused on the 26th. The Central Bank closed its doors on the 27th. It was not until after this occurred that any objection was made to the method of collecting and settling for the check that was pursued, and it was sought to hold the Central Bank, and through it the Trust Company, as trustee of the proceeds of the collection.

It should be added that it was not contemplated on either side that when the Central Bank made the collection it should hold the money collected as a special deposit, and remit in specie. It was intended that that should be done which was done, *viz.,* that the Central Bank should commingle the money collected with its own funds, and make settlement by a draft drawn upon some other bank in which it had funds on deposit. The Bank had for some time been the Yakima correspondent of and made collections for the Seattle National Bank. The method pursued in this case was the method invariably pursued in making such collections. (Trans., 41-42.) Indeed, it appeared that from the 17th to the 22nd January the

Central Bank had made collections for the Seattle National Bank amounting to $100,000 (including the one involved), and that settlements for all such collections were made by drafts drawn upon the Trust Company. (Trans., 140-141.)

Moreover, the custom of banks with respect to such matters is so established and well known that every one dealing with them is presumed to have been conversant with and to have contracted in contemplation of the custom, and that the courts will take judicial notice of it. *Bowman vs. Bank,* 9 Wash., 614, 38 Pac., 211, *Commercial Bank vs. Armstrong,* 148 U. S., 50, *First Nat'l. Bank vs. Davis* (N. C.), 19 S. E., 280. Every one knows that out-of-town checks are collected through correspondent banks; that a collecting bank does not collect each check directly from the bank upon which it is drawn and remit therefor in specie, but that all the checks it has for collection are thrown into hotchpotch and collected through the clearing house; that the collecting bank will receive nothing from the checks it presents unless the balance of the day's clearings chances to be in its favor, and in any event will receive nothing but the difference between the amount of the checks which it presented and the amount of the checks which were presented against it; and that therefore remittances to cover collections will be made from the bank's general funds, and not from the specific money collected. What every one knows the courts will judicially notice, so, as above remarked, they will judicially notice the custom of making collections by banks.

Now, whenever it appears, either from the agreement between the parties, or, when there is no special agreement between them, by referenece to the general banking custom, that the collecting bank was not to hold the money collected as a special deposit and remit in specie, but was expected to commingle such money with its general funds and make settlement by means of a draft drawn on another bank, it is uniformly held that when the collection is made the relation between the collecting bank and the customer or correspondent for whom it makes the collection is that of debtor and creditor, and not that of trustee and *cestui que trust.* In *Bowman vs. First Nat'l. Bank,* 9 Wash., 614, 38 Pac., 211, the facts and the opinion of the Court thereon were as follows: Plaintiffs (respondents in the Supreme Court) sent a draft, drawn upon third parties, to the defendant bank for collection. The bank collected the draft, and in settlement sent plaintiffs its draft, drawn upon a New York bank. Before that draft reached plaintiffs, the defendant bank closed its doors, and when it was presented to the drawee, payment was refused. Plaintiffs brought suit against the defendant bank and its receiver, seeking to establish that the money collected was a trust fund. It was held they could not recover; that a trust relation was not involved, but merely that of debtor and creditor:

> "It follows that, in our opinion, the transaction, even if uninfluenced by any action of the respondents after the collection was made, would have established between them and the defendant bank the relation of creditor and debtor, and not

> that of *cestui que trust* and trustee. But, if this were not so, the act of the respondents in receiving the draft, and forwarding it for collection, would clearly show an intent on their part to pass the title to the specie collected to the defendant bank, and accept its responsibility as drawer of the draft of which they were the payees in lieu thereof. They accepted such draft without objection, and disposed of it in the usual course of business, and by so doing put themselves in the same relation to the bank as they would have been if they had forwarded the money, and directed it to send its draft or certificate of deposit therefor."

Another pat decision is *Hallam vs. Tillinghast,* 19 Wash., 20, 52 Pac., 329. The findings of fact in that case were that plaintiff (respondent in the Supreme Court) deposited an out-of-town draft with a bank for collection; that he "delivered said draft to said bank for collection only and for no other purpose;" that he "never deposited or agreed to deposit the proceeds of said draft or any part thereof with said bank;" and that the bank suspended payment a few days after the draft was collected. It was again held that no trust relation was involved, and that the proceeds of the collection could not be pursued as a trust fund.

> "There is no contention that there was any agreement that the particular money should be preserved in specie. In fact, it must be presumed, under the custom stated, that the particular money paid to satisfy the draft was never received by the bank here, as following the custom, the draft would be sent by the bank to its correspondent where the draft was payable, for collection, and, when paid, under such custom the specie would

> not be remitted, but the bank sending the draft would be credited with the amount merely, and such matter left for future settlement in the balancing of accounts. The respondent was bound to know this custom. The fact that he never specially agreed to deposit the proceeds of the draft with the bank made no difference. If he wanted to except it from the usual custom there should have been an agreement that the specific money should be set aside for him, or disposed of in some particular way, or, at least, that upon the payment of the draft a like amount should be segregated from the general funds of the bank and kept for him, thus keeping the proceeds in a special substituted form. Had this been done prior to the insolvency of the bank no doubt a trust would have resulted as against the receiver, if the particular proceeds in either the original or substituted form came into his possession."

In *Commercial Bank vs. Armstrong*, 148 U. S., 50, a bank in Cincinnati agreed to collect items at par for a bank in Philadelphia and remit every 10 days. The Cincinnati bank failed, and the Philadelphia bank filed a bill of complaint seeking to charge its receiver as trustee of the proceeds of sundry collections. The items were divided into two classes. The first included the items which had not been collected when the Cincinnati bank failed; the second included the items which had been collected before it failed. It was held that the plaintiff was entitled to recover on account of the first class, because until a collection was made the relation between the Philadelphia bank and the Cincinnati bank was that of principal and agent. It was held, however, that it could not recover on account of the second class, because the relation of

principal and agent ceased as soon as the collection was made, and the relation of creditor and debtor supervened. Affirming the decision of the Circuit Court, which had held there could be no recovery of the second class on the theory that the amounts collected could not be traced, the Supreme Court said:

> "We think, however, a more satisfactory reason is found in the fact that, by the terms of the arrangement between the plaintiff and the Fidelity, the relation of debtor and creditor was created when the collections were fully made. The agreement was to collect at par, and remit the first, eleventh, and twenty-first of each month. Collections intermediate those dates were, by the custom of banks and the evident understanding of the parties, to be mingled with the general funds of the Fidelity, and used in its business. The fact that the intervals between the dates for remitting were brief is immaterial. The principle is the same as if the Fidelity was to remit only once every six months. It was the contemplation of the parties, and must be so adjudged according to the ordinary custom of banking, that these collections were not to be placed on special deposit and held until the day for remitting.
>
> * * * * * * *
>
> Bearing in mind the custom of banks, it cannot be that the parties understood that the collections made by the Fidelity, during the intervals beween the days of remitting, were to be made special deposits, but on the contrary, it is clear that they intended that the moneys thus received should pass into the general funds of the bank, and be used by it as other funds, and that when the day for remitting came, the remittance should be made out of such general funds."

The principle of the above case was reaffirmed in *Evansville Bank vs. German-American Bank,* 155 U.

S., 556. It was applied in *First Nat. Bank vs. Wilmington Ry.* (C. C. A. 4th Circ.), 77 Fed., 401, and *Richardson vs. Louisville Banking Co.* (C. C. A. 5th Circ.), 94 Fed., 442.

The fact that in the Commercial Bank Case the agreement was that remittances should be made at stated intervals—every 10 days—while in the present case the implied agreement was to remit as soon as the collection was made, does not differentiate the two cases. Unless there is a special direction that the proceeds of a collection shall not be commingled with the bank's funds, but shall be held as a special deposit and remitted in specie, the collecting bank will, under the custom of banks, be merely a debtor for the amount of the collection. *Hallam vs. Tillinghast, supra.* It is the commingling of the money collected with the bank's funds that causes that result, and it is immaterial whether the commingling was for a few hours or a few days. It was remarked in the Commercial Bank Case that it was immaterial that the remittances for the collections were to be made at such short intervals. However, an attempt to distinguish that case because of the agreement that the remitances were to be made at stated intervals was made in *First Nat'l Bank vs. Davis* (N. C.), 19 S. E., 280, where the agreement was that the remittances were to be made immediately. Holding the attempt to distinguish futile it was said:

> "It is true that, in the cases cited above, the contracts provided that the collecting bank should remit, not daily or on the day of collection, but

at stated periods. But we do not think that the difference in the terms of the contracts can make the principles fixed by those high authorities inapplicable here. The test is, did the plaintiff bank agree, expressly or impliedly, that the proceeds of drafts, checks, etc., sent by it to its collecting agent, the Bank of New Hanover, should not be held by the latter as a special deposit, but merely mingled with the other funds coming in and used in the daily intricate payments and collections of its usual business? Such an understanding or agreement does not appear to us at all inconsistent with the expressed stipulation that remittances should be made each day. This stipulation only required that that should be done each day which, under the contracts under consideration in the cases cited above, was to be done, not daily, but at longer intervals. The important point is not, as we have said, where or how often the remittances were to be made, but whether it was understood that the collecting bank could and would transact the business as it did, treating the checks, drafts, etc., sent it as its own in its daily transactions, keeping memoranda or book entries to show how much was due to the plaintiff and to other banks for whom it was doing like services, and then, at a convenient hour and in some convenient way, transferring to the plaintiff bank the money due to it. The manner of keeping the account was immaterial—a mere matter of bookkeeping. If, under the contract, it was not wrongful for the Bank of New Hanover to use money coming to it from the collection of plaintiff's drafts, checks, etc., as its own, and remit other money, or other checks and drafts, to the plaintiff therefor, then it must be that there was no breach of trust or unlawful conversion in the conduct of the officers of the Bank of New Hanover in the conduct of this business for plaintiff. It seems to us plain that both banks must have clearly understood that

> the relation of principal and agent as to any particular check or draft sent for collection ceased just as soon as cash or its equivalent was received by the collecting bank, and that immediately there was substituted for that relation, as to that cash, the relation of debtor and creditor."

At any rate, the decisions of the Supreme Court of Washington bearing upon this subject ought to be followed, especially when there is no conflict between them and the decisions of the Supreme Court of the United States. The Trust Company and Central Bank are both Washington corporations, and plaintiff is domiciled and engaged in business in Washington. All the transactions upon which the action depends occurred in Washington. This Court has undeviatingly held that where a cause of action wholly arose within a given state, and the matters involved were of merely local concern, the applicable decisions of the courts of that state ought to be followed. *Old Colony Trust Co. vs. Tacoma,* 230 Fed., 389, *American Surety Co. vs. Bellingham Nat'l Bank,* 254 Fed., 54, *Columbia Digger Co. vs. Sparks,* 227 Fed., 880. In so holding it is in accord with the Supreme Court. *Sim vs. Edenborn,* 242 U. S., 131, *Bamberger vs. Schoolfield,* 160 U. S., 149, *Detroit vs. Osborne,* 135 U. S., 492.

Plaintiff, we assume, will endeavor to escape the effect of the cited decisions by the claim that the Central Bank was insolvent when it received and collected plaintiff's check, and that consequently it was a fraud upon plaintiff, warranting rescission of the contract between the parties and holding the Bank as a trustee

ex maleficio, for the Bank to make the collection in the manner it did.

That the Bank was insolvent will be conceded. It is evident that it could not have gone through the deflation period, meeting all the demands which would inevitably have been made upon it, without outside assistance. It will be conceded, also, that under certain circumstances the insolvency of a bank at the time it receives a deposit or undertakes a collection is cause for rescinding the contract and holding the bank as trustee. Mere insolvency, however, is not enough to have that effect. The contract cannot be rescinded unless the bank was guilty of fraud in entering into it. The right of rescission in such a case is based, by analogy, upon the right of a vendor of goods to rescind a sale he has made to a trader who is hopelessly insolvent, who knows he cannot and will not pay for the goods, and yet obtains credit for them on the strength of his apparent solvency. It follows that a contract with an insolvent bank cannot be rescinded and it be held as trustee unless it was hopelessly and irretrievably insolvent, and was known by its managing officers to be so, as the result of which they knew when the contract was entered into that the bank could not and would not pay the money which was the subject of the contract. *St. Louis, etc. Ry. vs. Johnston,* 133 U. S., 566. In *Craigie vs. Hadley,* 99 N. Y., 131, a leading case upon this subject, the suit was to recover a deposit made on the 13th of a given month. It was said:

> "The bank was not only irretrievably insolvent, but it had apparently given up the struggle to maintain its credit before the deposit was made. Its drafts had gone to protest on the 12th, and it was manifest that a condition of open insolvency must immediately ensue. The acceptance of the deposit under those circumstances constituted such a fraud as entitled the plaintiffs to reclaim the drafts or their proceeds."

The bank's officers having knowledge, as they of course did, that it must close its doors in a few hours, it was held the contract could be rescinded and the amount of the deposit recovered.

In *Raynor vs. Scandinavian-Am. Bank,* 22 Wash. Dec., 46, deposits were made in the defendant bank on the same day that the bank commissioner (examiner) closed its doors. The Court held that as "the evidence conclusively shows that the bank receiving the checks as a deposit was hopelessly and irretrievably insolvent at that time, and was then known to be so by its managing officers," the bank was guilty of fraud in receiving the deposits which warranted rescission and recovery of the deposits.

In *Furber vs. Dane* (Mass.), 90 N. E., 859, in speaking of known insolvency as a fraud it was said:

> "The effect of this fraud is to make the bank a trustee *ex maleficio.* But the depositor must show that a real fraud has been practiced upon him, and to do this he must show affirmatively both that the bank was actually insolvent when it received his deposit and that its managing officers then knew this to be the fact."

Actual fraud, then, is the touchstone of the right

to rescind, and guilty intent is the touchstone of actual fraud. Good faith is destructive of both, and there can be no rescission if the managing officers of a bank in good faith believed, at the time it entered into a business engagement, that it would be able to respond thereto. The bank may be insolvent, its managing officers may know that it is so, may know that it is in a serious condition, may know that any untoward occurrence or the disappointment of hopes for succor which they entertain will cause it to close its doors, yet if they in good faith believe that it will be able to surmount its difficulties they are justified in keeping its doors open and making the every day engagements of the banking business. If their belief or hope proves unfounded, and the bank is forced to close, persons dealing with it cannot claim a fraud was perpetrated, and hold the bank or its liquidator as trustee.

> "If the president and officers of the bank knew or believed that the bank was hopelessly and irretrievably insolvent at the time of receiving the deposit of the complainant, then a fraud was undoubtedly committed by the bank upon the complainant, for which there should be a remedy. But fraud must be proved, and is not to be presumed, and the burden of proof is on the complainant. The mere fact that the bank was in an embarrassed condition, by reason of the large indebtedness to it from its president, is not sufficient of itself to establish the fraud alleged in this case. A trader, whether a corporation or an individual, may be struggling in the straits of financial embarrassment, but with an honest hope of weathering the financial storm and of being eventually solvent. Property received by such an individual or concern in the ordinary course of business dur-

ing the period of such embarrassment becomes honestly theirs, and the fact that their expectations were unrealized, and their hopes not well founded, would not fasten upon them a fraud that would vitiate their business transactions."

Quin vs. Earle, 95 Fed., 728, 732.

"However, the mere fact that the bank is known to be insolvent at the time the deposit is received is not in our opinion sufficient of itself, without more, to confer this right of rescission upon the depositor, and such right of rescission would not arise when the bank at the time of receiving the deposit, although embarrassed and insolvent, yet had reason to believe that by continuing in business it might retrieve its fortunes; the necessary condition upon which the right of rescission is predicated being that the deposit was received when the bank was hopelessly embarrassed and so circumstanced as to constitute its receipt of the deposit a fraud upon the depositor. See St. Louis Ry. Co. vs. Johnston, *supra*, at pages 576, 577.

In the present case it merely appears that the bank was insolvent at the time this deposit was received, and had been known to be insolvent for ten years previously by the cashier who received the deposit. The extent of its insolvency at that time is not shown, nor is there any evidence as to what subsequent events precipitated the condition which caused its doors to close, or whether or not at the time the deposit was received the bank, although embarrassed and insolvent, yet had reasonable hopes that by continuing in business it might retrieve its fortunes, just as it had previously continued in business for the ten preceding years during which it had been insolvent."

Brennan vs. Tillinghast, 201 Fed., 609, 615.

"The mere fact of insolvency at the time the deposit was received is not sufficient to justify a finding of fraud, but the insolvency must be of

such a character that it was manifestly impossible for the bankers to continue in business and meet their obligations; and that fact must have been known to the bankers, so as to justify the conclusion that the bankers accepted the depositor's money knowing that they would not and could not respond when the depositor demanded it. It is fraud that must be proved. An honest mistake as to the condition of the bank and an honest belief in the solvency of the institution, if it exists, negative the conclusion of the fraud upon which the plaintiff's cause of action must depend."

Williams vs. Van Norden Trust Co., 93 N. Y. Supp., 821, 823.

In a case in which a closely allied question was involved, the Supreme Court has dealt with the effect of actual insolvency upon ordinary banking transactions in the absence of proof of knowledge and intent on the part of the bank's officers. The receiver of an insolvent national bank sought to avoid certain payments and remittances made by it within a few days before its doors were closed, proceeding on the theory that these were transfers in contemplation of insolvency, and so forbidden by §5242, Rev. Stat. There was no question of the insolvency of the bank at the time, and it was insisted that this insolvency must have been known to its officers, and that therefore they intended a preference. Holding otherwise, the Court said:

"It is a matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in

> the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided.
>
> * * * And the evidence fails to disclose any intention or expectation on the part of its officers to presently suspend business. It rather shows that, up to the last, the operations of the bank and its transactions with the Chemical National Bank were conduced in the usual manner. It may be that those of its officers who knew its real condition must have dreaded an ultimate catastrophe, but there is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency, or with a view to prefer the defendant bank."
>
> *McDonald xs. Chemical Nat'l Bank,* 174 U. S., 610, 618.

For other cases holding there could be no rescission although the managing officers knew the bank to be insolvent, but did not believe it to be hopelessly and irretrievably so, see *Terhune vs. Bank*, 34 N. J. Eq., 367, *Perth Amboy Gas Co. vs. Middlesex County Bank* (N. J.), 45 Atl., 704, *New York Brew. Co. vs. Higgins*, 29 N. Y. Supp., 416, *Stapleton vs. Odell*, 47 N. Y. Supp., 13, *Goshorn vs. Murray*, 197 Fed., 407 (affirmed on this point but reversed on another in 210 Fed., 880).

Under the doctrine of the above cases, it cannot be reasonably contended that the Central Bank was guilty of fraud in undertaking the collection of plaintiff's

check and handling the collection in the customary manner. The manner in which the Bank became insolvent, and the circumstances under which it suspended payment, dispel any notion that its officers then knew it to be hopelessly insolvent, and that it would be unable to pay plaintiff the money collected. On the contrary, the circumstances show that the officers of the Bank did not believe its case to be hopeless until almost the moment that its doors were closed. Here was the manner in which it came to grief: Yakima is a purely agricultural country, and the record shows that the Bank's loans were wholly to agriculturists or to persons whose business was dependent on them. The deflation period caused a contraction of money and shrinkage of bank deposits. The deposits of the Bank declined from $665,753 in November, 1920, to $426,151 on 25th January, 1921. The $240,000 which it was thus obliged to pay out had to be obtained by the Bank from some source. When it endeavored to collect the money from its borrowers it found them unable or unwilling to pay. The same influences which had caused deposits to shrink had caused people to stop buying, so far as possible, and prices to fall. The agriculturists of the Yakima country were either unable to find a market for their produce, or could only dispose of it for ruinous prices. In the majority of cases the Bank was unable to enforce payment, and in cases where it could enforcement would have meant ruin to the borrower. Drastic measures would probably react on the Bank, for the rumor would go abroad that it must be in straits,

else it would not deal so harshly with its customers, and a run on it might result. In any event it was indisposed to bring too much pressure to bear, for its officers, like all other Yakima bankers and business men, shared in the optimism of the producer, and believed that in 60 or 90 days conditions would improve and produce could be moved at a fair price. All these things appear from the Buckholtz letters, of which more will be said hereafter, and which clearly reflect conditions as they were in January.

But in the meantime, as subsequent events show, the Central Bank was slowly bleeding to death. To keep up its credit it was necessary that it should make some loans, there was a steady, if gradual, withdrawal of deposits, and the banking act required it to maintain a cash reserve of 15% of its total deposits. The collections it could make without resorting to unduly harsh measures were insufficient to enable it to meet these demands, so it sought assistance from the Trust Company, Unfortunately, however, the Bank's officers had permitted it to become overloaded with an undesirable class of paper, some of which was uncollectible, and a large part of which was non-liquid, *i. e.*, not capable of being realized on in the desired banking period of 60 to 90 days. As a result, after the Central Bank was in the debt of the Trust Company to the amount of $185,000 to $190,000, and needed still more money to carry it to the improved conditions which the Yakima people were certain was right around the corner, it had nothing to offer except "good but slow" paper, *i. e.*, paper which would not be paid before the

1921 crops were marketed. The Trust Company was exceedingly reluctant to make further advances on such security, but, as we have seen from Triplett's letter of the 24th heretofore referred to, it did agree to make an additional advance of $30,000 on "good but slow" paper. However, the presentation of the $51,000 draft, payment of which would have meant an overdraft of $27,000 with no arrangements for covering it, prevented anything being done with this offer. It was the dishonoring of that draft on the 26th that made the Bank's case hopeless, but even then neither the Bank's officers nor the State bank examiner believed it would be forced to suspend payment. They thought its assets good, albeit slow of collection, and that the other Yakima banks would rather take over slow paper, on which they would not ultimately lose anything, than to permit a bank to close in their midst, with the unsettling of their own credit that would result. It was not until after the Yakima bankers, gathered together in conference upon the situation, had declared much of the Bank's paper worthless, and that no reasonable amount would save the Bank, that its officers and the bank examiner appreciated there was no hope for it. Doubtless the Bank's officers ought to have known the worthless character of much of its paper as well as the other Yakima bankers did after they saw it, but the important fact is that they did not. And it is their ignorance of the true situation that relieves the Bank from the imputation of fraud in the transaction complained of.

Developing the evidence against the fraud theory

step by step, it is first to be remarked that Washington has a complete banking code, and that the State is given plenary power over the supervision and regulation of State banks. The bank commissioner (examiner) is required to visit each bank at least once in a year, and oftener if he thinks necessary, for the purpose of making a full investigation of its condition. Whenever he finds a bank in an unsound condition or doing business in an unsafe manner he is required to close its doors, take possession of its assets, and wind up its affairs, the courts being deprived of jurisdiction to appoint receivers or in any other way interfere with the examiner's control thereover. Session Laws 1917, pp. 272-3, 300-5, Remington's Comp. Statutes 1922, §§3214, 3266-80. An examination was made of the Central Bank in June, 1920. While the examiner disapproved of some of the methods of Ellis, cashier and manager of the Bank, he entertained no doubt of the Bank's solvency, for his suggestions as to its methods were merely in the way of recommendations, which the Bank was at liberty to accept or disregard, as it pleased. In December, only about a month before the Bank's doors were closed, the examiner did request Barghoorn, the Bank's president, to remove Ellis and put another man in his place. Even then the examiner did not regard the situation as exigent, and was satisfied with Barghoorn's promise that the change would be made as soon as a suitable man to succeed Ellis could be found, and the change could be made without causing trouble. (Trans., 62-65.) Owing to rumors relative to the

Bank's condition which had reached the examiner, he went to Yakima to make another examination of it in January, reaching there the morning of the 26th. Before he went he had been informed of the outstanding draft for $51,000, and understood that the Trust Company would not pay it. Knowing this, when he looked over the Bank's balance sheet on the morning of the 26th he saw that the situation was grave, and that immediate steps would need be taken to raise the money to meet the draft. He therefore went to the other Yakima banks to get assistance from them. Representatives from those banks spent the day and night of the 26th, and well into the forenoon of the 27th, in going over the paper owned by the Central Bank, and it was owing to the discouraging view taken by them of its paper that he finally concluded its doors must be closed. Yet he testified that when he began the examination on the morning of the 26th he saw no reason for taking over the institution, and it was only the opinion expressed by the representatives of the other Yakima banks of the quality of its paper that caused him to take that action. He said, however, that he believed that with the amount of assistance suggested (from $75,000 to $100,000), the trouble could have been tided over and the bank have survived, and that in his opinion subsequent developments had shown his belief to be justified. (Trans., 63-64.)

Turning to the officers of the Central Bank, those who directed its affairs, and so were responsible for its continuance in business and the engagement into which it entered with plaintiff, were Barghoorn, its

president, and Ellis, its cashier and, by reason of Barghoorn's non-residence, actual manager. There were a vice president and directors, but they were never mentioned in connection with the Bank's operations, and the evidence shows them to have been merely titular officers, who knew nothing of and had nothing to do with the Bank's affairs. (Trans., 67.) Now, the Bank's failure was caused by a withdrawal of deposits, falling markets and consequent inability to make collections, and an overload of non-liquid and bad paper. The last factor was the one that caused the final crash, for there is no doubt that if the Bank's paper had been liquid, or even good, albeit slow, it would have had no difficulty in obtaining enough assistance from the Trust Company or other banks to keep going. Barghoorn and Ellis knew, of course, of the withdrawal of deposits, the difficulty in making collections, and the consequent embarrassment of the Bank for ready money, but it is evident they did not know of the doubtful quality of the paper it held until the very last; not, indeed, until the other Yakima bankers sat in judgment on it on the 26th and 27th, and condemned much of it as utterly bad. As a result of this ignorance they did not think the Bank was in any danger. They confidently expected conditions would become better; that withdrawal of deposits would cease, markets improve, and collections be easier. But if those things failed them, they entertained no doubt of being able to obtain all the money necessary by borrowing upon collateral or rediscounting notes, for they had no doubt of the quality of the paper they had to offer

for those purposes.

We first take up Ellis, because he was the man on the ground, the man upon whom the chief responsibility rested, for Barghoorn did not live in Yakima and was seldom there. Ellis became an officer of the Central Bank in February, 1920, less than a year before it suspended. He soon incurred the criticism of the State banking department. After the June examination the examiner formed the opinion that Ellis was too optimistic, was not informed concerning the Bank's loans, and that his system of keeping accounts was slovenly. He was inclined to excuse Ellis to some extent because of the short time Ellis had been with the Bank, but wrote Barghoorn calling attention to some of Ellis' shortcomings. In December, about a month before the Bank closed, the examiner again wrote Barghoorn, this time requesting that Ellis be removed. About the same time the examiner chanced to see Barghoorn personally in Yakima, and went over the grounds of complaint against Ellis. These were that Ellis was an optimist; that he overestimated the resources of the Bank; that he did not take sufficient account of falling prices; and that he was disposed to expand rather than contract. In view of falling prices and continued deflation, the examiner thought "a man of far sterner stuff" than Ellis was needed in charge of the Bank. (Trans., 62-65.) Barghoorn expressed a willingness to comply with the examiner's request, but said it would be necessary to clean house gradually; that because of Ellis' wife and children he was loath to discharge Ellis; but that he

was endeavoring to get hold of a suitable man to take charge of the Bank, and as soon as he could do so would put him in Ellis' place. (Trans., 63.) As will be shown under a subsequent head, it was in pursuance of this request from the examiner that Barghoorn soon after employed Buckholtz and sent him to Yakima, intending that he should ultimately take Ellis' place.

Ellis, testifying for plaintiff, said that he knew of the examiner's criticism. While denying, naturally, that he was in any way at fault, he admitted that the criticism of his ignorance of the Bank's loans was justified. He excused his want of knowledge by the fact that he had been with the Bank but a short time, saying that it was utterly impossible for him to familiarize himself with the character of its paper in so short a time. (Trans., 95, 97.)

A strong sidelight is cast upon Ellis' disposition by Buckholtz' letters to the officers of the Trust Company. In a number of incidents Ellis' unquenchable optimism and easy going nature appear. A sale of the Central Bank was in prospect, which would apparently have solved the Bank's financial problems, and Ellis was at all times entirely confident it would go through. (Trans., 148.) Ellis saw advancing prices, good crop movements, and abundant money for the Bank's needs coming in. In trying to arrive at the true situation Buckholtz heavily discounted his figures and took all his estimates with a large allowance of salt. (Trans., 223.) Ellis was inept in the enforcement of collec-

tions. Borrowers whose notes were overdue would receive considerable sums, and notwithstanding the need of the Bank for money Ellis would permit them to renew their notes and use their money elsewhere. That sort of thing became so flagrant that Buckholtz finally took Ellis to task, and strongly intimated that in the future Ellis must not meddle with such matters, but leave them to Buckholtz. (Trans., 184-191.) The letters, in short, show Ellis in the same light that the testimony of the bank examiner shows him, and prove that because of his optimism and easy going nature he did not sense the situation, and had no idea that the Bank was insolvent or in any way embarrassed. The examiner, the administrative officer whom the State had charged with control over the Bank, said that Ellis was incompetent but not dishonest. (Trans., 62.) The courts ought not, on mere suspicion, to override that official's judgment.

Next of Barghoorn. He lived in Spokane, had many other business interests besides his interest in the Central Bank, and was seldom in Yakima. He became a shareholder in the Bank in May, 1919, and its president in January, 1920. Where, as here, a bank's failure is not due to the dishonesty of its officers, but to its inability to realize upon its loans as need arose, knowledge of its insolvency cannot be charged to a particular officer unless he is shown to have known of the character of the loans. In the nature of things, Barghoorn, who had never lived in Yakima, who had been connected with the Central Bank but a short time, and who was not in charge

of its daily operations where he might more quickly have obtained information concerning its borrowers, could have no discriminating opinion of its loans. Of necessity he would have to rely largely, if not wholly, upon the opinions of others. The testimony permits no doubt that Barghoorn believed the loans of the Central Bank to be of a high character, and that, while the Bank was temporarily embarrassed by a shortage of cash, there could be no doubt of its solvency if the temporary trouble was overcome. The bank examiner, who went from Spokane to Yakima with Barghoorn on the night of the 25th, after it was known that the Trust Company would refuse to pay the $51,000 draft, said that from his conversation at that time with Barghoorn he believed Barghoorn "had no suspicion whatever that the bank was going to have to close; that while he was cognizant of the danger of a cash shortage, he didn't question the worth of his assets." (Trans., 64.) At another place in his testimony he said of Barghoorn that "his attitude was more that of fearing a collapse of the credit of the bank and an apprehension over being able to provide cash for the situation, rather than a fear of the intrinsic worth of his assets." (Trans., 65-66.) If such was Barghoorn's point of view on the 25th, two days before the Bank closed, and after he knew that the Trust Company would not pay the $51,000 draft, it is beyond belief that on the 21st, when everything was moving smoothly, he believed the Bank to be insolvent, to say nothing of being hopelessly and irretrievably so.

In speaking of Barghoorn, it must be kept in mind that on the 21st he could have had no inkling of trouble in securing continued assistance from the Trust Company. He was a director of the Trust Company from 1908 until the 11th January, 1921, when he retired of his own volition. (Trans., 49, 122.) His relations with its officers, naturally, were very friendly. It had been exceedingly liberal in its financial aid to the Bank, and it was not to be supposed that it would discontinue that aid so long as the Bank had good paper to offer for security or rediscount. Inasmuch as Barghoorn entertained no suspicion of the good quality of the Bank's paper, it is apparent that on the 21st he expected an uninterrupted continuance of such financial aid from the Trust Company as might be necessary. And it is his expectation or hope on the 21st, the day plaintiff's check was collected, which is determinative of whether there was fraud in the transaction.

Perhaps the most convincing evidence that no one connected with the Central Bank thought it hopelessly insolvent are Buckholtz' letters to the officers of the Trust Company. They have no direct bearing upon the question of whether the Bank was guilty of fraud in that, being hopelessly insolvent, it received and collected plaintiff's check, for Buckholtz was not an officer of the Bank and had no voice in whether it should close or remain open, in whether the collection should be undertaken or refused. His individual opinion concerning its solvency would therefore have no more effect upon the direct question of its fraud

than would the opinion of any mere clerk in the Bank. Moreover, he had been with the Bank less than a month, and his opinion concerning the worth of its assets, and consequently of its solvency, would not have much weight. He was in a position, however, to sense the feeling of the officers of the Bank concerning its condition. He was there to succeed Ellis ultimately, and in the meantime to assist Ellis in conducting the Bank through the deflation period. He saw all that was going on, and if the Bank's officers were apprehensive of its solvency he would have known it. His letters may therefore be said to afford a peep behind the scenes and to disclose what went on in the Bank during the last month of its existence. They are more satisfatcory than any after-the-event testimony would be, for no doubt can be entertained of their sincerity, and that they honestly reflected conditions as he saw them. He had long been an employe of the Trust Company, and was very friendly to its officers. It was upon their recommendation that he had been given the opportunity at Yakima, whereby, if things had gone well, he would have succeeded Ellis as virtual head of the Central Bank. While his letters show him entirely faithful to his new employer, they also prove him loyal to his old employer in all the things of which he wrote. There was no inconsistency in his attitude, for it is evident that Barghoorn did not desire to overreach the Trust Company, or to obtain support from it to which the Central Bank was not properly entitled. From the first, then, the letters show Buckholtz endeavoring to

put matters before the Trust Company fairly. In offering paper for rediscount, he stated its good points, but did not endeavor to conceal disadvantageous features. In speaking of the present and forecasting the future, he wrote freely of conditions about Yakima and in the Central Bank. He told of falling prices, scarcity of money, the difficulty in making collections and keeping up the Bank's cash reserve. Reading the letters in their entirety, no doubt is left in the reader's mind that Buckholtz never, until after the Bank closed its doors, believed it to be hopelessly insolvent, but on the contrary thought that the only difficulty it had to contend with was in keeping up its cash reserve for 60 or 90 days, when, according to the prognostications of all the Yakima wiseacres, bankers and others, crops would begin to move and money and collections be easier. There are too many of these letters to permit of reference to them at length, but we refer briefly to some of them, these extracts being typical of the vein that runs through them all.

It should be premised that it appears from this correspondence that negotiations for a sale of the Central Bank were pending all through the month of January; a sale, it would seem, that would relieve the Bank's (supposedly) temporary cash shortage, and that all concerned in its affairs considered the sale as an alternative relief in the event that business conditions did not improve.

Under date of 9th January, Buckholtz, writing to

Mr. Rutter, president of the Trust Company, said that he was confident "that we can get by and liquidate our indebtedness within 90 days, provided of course that the products held here will sell at all at reasonable figures." Failure to move the products he thought was "not so much a matter of holding for better markets but a matter of light demand temporarily." The matter of making a sale, and Ellis' firm conviction that it would go through, were referred to. The writer said, however, that he was not depending on that in making his forecast, but on the liquidation which he thought would be possible without bringing so much pressure to bear as to do the Bank injury. (Trans., 148.)

Under date of the 17th, in a letter to Triplett, Buckholtz spoke of the marketing difficulties produce growers were having, and the belief of other banks that produce would shortly move and relieve conditions. He said that he was going to keep pounding along, but that "I don't expect to do any great volume of liquidating until February or March. I am figuring on from $100,000 to $150,000 out of hops and apples during the next 90 days. If these two items don't move, we are going to have some mighty hard sledding and it won't be this bank alone." In the same letter he said that deposits were holding up well, and that they expected to get a $50,000 deposit of county funds the last of Febuary or first of March. (Trans., 179, 181.)

Writing Triplett on the 19th, Buckholtz acknowl-

edged the justice of Triplett's criticism, made some days before, respecting the Central Bank's way of handling rediscounts, but said that "no doubt for some weeks it will remain a question of which is preferable to you—overdrafts or past due rediscounts." He proposed a $20,000 increase in rediscounts if the Trust Company would take "stuff that will not be paid until 1921 crop returns are in." (Trans., 198.)

On the 21st he wrote that he had talked with other Yakima bankers, that they also were carrying a heavy burden, but that they were all "more or less confident of a good washing out of stuff during the next 90 days" through miscellaneous crop movement. This, he said, was the only chance "to liquidate our borrowed money down to a reasonable amount and maintain a cash reserve." He closed in a semi-jocose vein by likening the Central Bank to a man at the point of death, but with a hopeful doctor on the job who was able to discern signs of improvement, "and speaking to the patient's wife and children, you would say that he had good chances for complete recovery." (Trans., 219-221.) That he did not intend the comparison to be taken too seriously is evidenced by the fact that two days later, on the 23d, he sent Mr. Rutter a "list of loans which I think can be collected in full during next 90 days aggregating $147,941." This amount, it was stated, did not include "partial reductions on those which cannot be collected in full." From the partial payments he expected an additional $50,000. Ellis' figures, he said, were much more optimistic, but "I have taken con-

siderable salt with his estimates," and the figures given he considered to be conservative. (Trans., 222-223.) And that it was not taken by Triplett to indicate that Buckholtz believed the Central Bank to be in a desperate or even serious condition is proven by the nature of Triplett's reply, written on the 24th, wherein he says that "The patient's friends and family are glad to hear that he is better; that he is no worse, and that he shows good prospects for improvement in the near future." He goes on to say that "this is extremely gratifying," but that the doctor must stay on the job night and day and be prepared for any relapse that may come, at the same time expressing, in the language quoted under the preceding head, the willingness of the Trust Company to stand back of the Central Bank to any reasonable extent if the Bank would furnish the Trust Company a class of paper on which it would not ultimately have to take a loss. (Trans., 224-226.)

In a second and longer letter written to Mr. Rutter on the 23d, evidently intended to give him a full and accurate view of the situation as it appeared to Buckholtz, he began by saying that "The last three days, I have felt very discouraged with the way things are going," and then stated the discouraging factors in detail, among them being the $51,000 draft, of which he spoke as follows:

> "Yesterday, we mailed a $51,000.00 draft on you to the Seattle National Bank covering a large letter of items on other local banks, the net of which has been remitted to you and no doubt we will have a few dollars there to meet it. The

draft will likely reach you Tuesday or Wednesday and if you pay it the overdraft created will be the limit to date of credit advanced this institution. Have Mr. Triplett ascertain the amount of the overdraft created if this draft is paid. If you do not pay it, we are gone."

On the other hand, in the same letter, he said that "business men and bankers here are confident of a good movement (of farm products) during February and March," and that if this occurred "I feel justified in making the statement that I am still confident of cutting down our borrowed money to a nominal amount if not entirely during the next 90 days." Even should the expected crop movement and liquidation fail to occur, and it became necessary for the Trust Company to carry an additional $50,000 of slow paper "which will reach an enormous sum by that time, * * * I believe the possibilities of the institution for future business and earning power to charge off bad paper is here. A bank is needed in this location and a good volume of business is assured, and with close and proper management, there is no doubt in my mind but what the indebtedness carried by the Spokane & Eastern Trust Co. can eventually be worked out and kept within reasonable bounds and worked into a valuable account." Information was asked as to "whether or not you will back the institution and myself any further in case of necessity," and the letter closed with a postscript in which the opinion was expressed that if the Trust Company would advance such additional requirements as might be necessary, which could hardly exceed $50,000 more

at the worst, it would get its money back much more quickly than by letting the Central Bank be closed. (Trans., 227-232.) On the next day, the 24th, in a letter to Triplett the Rutter letter was referred to, and Buckholtz said that "I cannot figure out any chance of keeping the balance in our favor outside of the methods outlined therein." He also said: "Wish you would write me frankly on how the S. & E. feels about things here and whether we can expect you to honor our drafts if the overdraft should go up to $25,000 or a little more, say for ten days or so, and see if something doesn't develop by then." (Trans., 232-234.)

These letters are sincere. They bear upon their face the indicia of honesty. They were written when there was no motive for coloring them or making of them anything but a frank expression of the writer's views and beliefs. And they strip of all pretense to reasonable consideration any claim that on the 21st, the day the Central Bank received and collected plaintiff's check, any one connected with it knew that it was hopelessly insolvent, and that therefore plaintiff would not receive the money collected. The question, be it remarked, is not of what the officers of the Bank might have known, or ought to have known in the exercise of reasonable prudence. It is not a question of incompetence or of negligence but of actual, intended fraud. Only proof of designed fraud; proof that the officers did know, not that they might have known, when they undertook to collect and made the collection, that the Bank was hopelessly insolvent and

that plaintiff would never get the money, will suffice to sustain plaintiff's case. These letters give the lie to the claim that there was knowledge or even apprehension of such a condition. They show Ellis, the man in charge of the Bank's affairs, to have been just such a man as the testimony of the State examiner painted him: illy acquainted with the true character of the Bank's loans, optimistic, inappreciative of the seriousness of the financial crisis through which the country was passing, and without any thought of impending danger. They show Buckholtz, in an endeavor not to be misled by Ellis' optimism, going, as he thought, to the opposite extreme. The Bank had three resources, he considered, to help it through the critical period. The first was the proposed sale. Ellis relied upon this confidently, but Buckholtz put it aside as too uncertain a factor to be depended on. The next was the crop movement in February and March, which all the Yakima bankers and business men expected to occur. If neither of the first two eventuated, then the Bank would have to rely upon the Trust Company to make further advances. No doubt was expressed that the Bank had plenty of good paper to furnish adequate security for such advances; the trouble with it was that it was slow (that is, if the 1920 crop did not move in February or March), and returns could not be expected on it until the 1921 crop. As Buckholtz explained in his testimony, when he spoke disparagingly of the paper it would be necessary to offer for further advances, he did not refer to its ultimate collectibility

but to its want of liquidity; to the inability to realize upon it quickly. (Trans., 128.) It was not until his letters of the 23d and 24th that he expressed any apprehension of danger, and then it was not concerning the ultimate ability of the Bank to pay its debts, but only of its ability to keep up its cash reserve until things took a turn for the better. It must be borne in mind that when those letters were written he had not received Triplett's letter of the 24th, in which it was said that if no deal could be made with "Herb" for releasing the $30,000 Liberty bonds for sale and taking paper in their stead, the Trust Company would take over the debt, if secured by "good but slow" paper, and thus release the bonds for sale. He was, therefore, solicitous to know whether or not the Trust Company "will back the institution and myself any further in case of necessity." It is plain that he hoped, indeed, expected, that it would do so, for he set forth the bright future of the Central Bank if it surmounted the temporary cash reserve difficulty, and the value of its account to the Trust Company. It may be admitted that he was mistaken about the value of the assets of the Bank and the amount that would be required to tide it over, but that is neither here nor there. It is the honest hope or expectation that counts; not the well or ill founded character of the hope or expectation. Banks "may be struggling in the straits of financial embarrassment, but with an honest hope of weathering the storm and of being eventually solvent," and under such conditions "Property received by (them) in the ordinary course of business becomes

honestly theirs." It is not enough to convict them of fraud that "their expectations were unrealized, and their hopes not well founded." *Quin vs. Earle, supra.* In a case where the cashier of a bank had known it to be insolvent for 10 years, it was held that "the mere fact that the bank is known to be insolvent at the time when the deposit is received" is not sufficient to warrant rescission on the ground of fraud; it must also appear that it was hopelessly embarrassed and failure not only certain but imminent. If it "had reason to believe that by continuing in business it might retrieve its fortunes;" if "although embarrassed and insolvent (it), yet had reasonable hopes that by continuing in business it might retrieve its fortunes," there was no fraud, and consequently no right to hold the bank's funds as a trust fund. *Brennan vs. Tillinghast, supra.* "It is a matter of common knowledge," said the Supreme Court, "that banks * * * continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency," there being the hope "that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided." The transactions of a bank doing business under such conditions were not violative of the national banking act although "those of its officers who knew its real condition must have dreaded an ultimate catastrophe," if it did not appear that they intended or expected, at the time of a particular transaction,

"to presently suspend business." *McDonald vs. Chemical Nat'l Bank, supra.* The thing to be ascertained, then, is what the officers of the Central Bank honestly expected or hoped concerning its fate on the 21st, the day the fraud was committed if committed at all. Did they then expect or hope that it would be able to surmount its present difficulties and continue business for some indefinite time; whether long or short is of no moment? Or did they know that it was doomed and must presently close its doors, so that plaintiff would not get its money? If Buckholtz' letters reflect their state of mind, there can be no question but that they expected the Bank would continue business indefinitely, for while in one of his letters written on that day he recognizes the increasing difficulty the Bank is having to maintain its cash reserve, he has various plans for dealing with it, and obviously expects no immediate trouble because of it. That two or three days later he was in a more downcast mood, and thought the Bank must close if the Trust Company would not allow the overdraft caused by the $51,000 draft, is immaterial. Men's moods change from day to day, usually with the state of their digestion or the way they sleep. What we are concerned with here is whether on the 21st the officers of the Central Bank knew it was hopelessly insolvent and would close its doors before plaintiff received its money, or whether they expected or hoped it would remain open for some indefinite time; at least long enough for plaintiff to get its money. We repeat that if Buckholtz' letters are accepted as a reflection of

their state of mind on that day, there can be no doubt that they expected the Bank to remain open for some indefinite time.

It was testified that after the Central Bank closed its doors Buckholtz expressed the opinion that it would not pay more than 30% of its indebtedness. His individual opinion is a matter of no moment, for, as heretofore pointed out, while it was intended that he should ultimately succeed Ellis, he had been given no official position and had no more voice in determining whether the Bank should remain open than any clerk would have. At any rate, what he thought after the Bank closed its doors is no criterion of what he thought before it did so. Subsequent events usually change opinions. Here there was good cause for Buckholtz' change of opinion. In the very short time he had been with the Bank, he could form no accurate opinion of the value of the great mass of its paper. Ellis, who had been with the Bank a year, said that he was not well informed concerning many of its loans because he had not had time to become so, and the examiner excused his ignorance for the same reason. (Trans., 97, 62.) Buckholtz, who had been with the Bank but 20 days, could scarcely be expected to know all about the loans. Just before the Bank closed he got some information concerning them which evidently its officers did not possess. When Stevens, the bank examiner, went into the Bank on the morning of the 26th, he looked at its balance sheet, and saw that immediate steps would need be taken to raise money to pay the $51,000 draft he knew to be out-

standing. He called the Yakima bankers together, and they held a series of conferences, extending through the day and night of the 26th and the morning of the 27th. The note pouch, containing the assets of the Bank, was put before them, and they went through the paper carefully in order to determine how much value was there and how much money would need be raised to tide the Bank over. The more they looked at the paper the less they liked it, and their estimate of the amount of money needed, reasonably low at first, finally reached a point where it was evident that nothing could be done, and that the Bank must close. (Trans., 57-58.) Buckholtz attended all these conferences and followed the estimates of the Yakima bankers. After hearing their estimate of losses, and taking into consideration the Bank's deposits and the amount of paper in the pouch, he thought the Bank would probably not pay more than 30%. He did not recall expressing the opinion imputed to him, but thought it quite likely that he did so, inasmuch as it was in accordance with the idea he formed after hearing the Yakima bankers' estimate of losses on the paper. (Trans., 130-131.)

In considering whether the persons connected with the Central Bank knew it to be hopelessly and irretrievably insolvent on the 21st, and so knowing kept it open, transacting its regular business, for six days longer, it must be kept in mind that a statute of Washington provides that any officer, agent, or employe of a bank who shall accept any deposit, or consent thereto or connive thereat, when he knows or

has good reason to believe that the bank is insolvent, shall be punished by imprisonment for not more than ten years in the penitentiary, or by a fine of not more than $10,000. 1 Remington's Comp. Statutes 1922, §2640. Of course the severity of criminal statutes does not keep men honest, and many bank officers have gone to the penitentiary because of offending against them. In all such cases, however, downright dishonesty, embezzlement or some other form of peculation, lay at the root of the crime. The guilty officers misused the funds of the bank, probably expecting to make the shortage good, but going on from bad to worse until it was impossible for them to extricate themselves. Here the honesty of the officers of the Central Bank is not questioned. No wrongdoing is or can be charged against them, save only that they kept the bank open after they knew it to be hopelessly insolvent. It is inconceivable that men of their standing, innocent of crime or any sort of wrongdoing, would without motive expose themselves to the severe penalties of the statute by keeping the bank open after they knew it to be insolvent.

Summing up, plaintiff cannot recover unless the Central Bank is held to have been a trustee *ex maleficio* of the money received from the collection of plaintiff's check. That cannot be held unless it is said that the managing officers of the Bank were guilty of actual fraud in undertaking the collection; unless it is said that they knew the Bank was hopelessly and irretrievably insolvent, and that when they received the money and sent it to the Trust Company they knew

plaintiff would not get it. The question is not of their incompetence or negligence, of what they ought to have known or might have known. The authorities agree that "It is fraud that must be proved." *Williams vs. Trust Co., supra.* Now, "fraud cannot be established by mere proof of negligence or failure to perform a duty." *Spokane vs. Amsterdamsch Trustees Kantoor,* 18 Wash., 81, 89.

> "Negligence and fraud are not synonymous terms; nor in legal effect are they equivalent terms. Fraud presupposes a willful purpose resorted to with intent to deprive another of his legal rights. It is positive in that the purpose concurs with the act, designedly and knowingly committed. Negligence, whatever be its grade, does not include a purpose to do a wrongful act. It may be some evidence of, but is not, fraud. Gardner vs. Heartt, 3 Denio, 232. Fraud always has its origin in a purpose, but negligence is an omission of duty minus the purpose. People vs. Camp, 66 Hun, 531, 21 N. Y. Supp. 741; Raming vs. Metropolitan Street Ry. Co., 157 Mo., 477, 57 S. W., 268; Cleveland R. R. Co. vs. Miller, 149 Ind. 490, 49 N. E., 445. This distinction was clearly pointed out in Kountze vs. Kennedy, *supra,* 147 N. Y. 129, 41 N. E. 414, 29 L. R. A., 360, 49 Am. St. Rep. 651, the court saying:
>
> 'Misjudgment, however gross, or want of caution, however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit.' "
>
> *Reno vs. Bull* (N. Y.), 124 N. E., 144.

The burden, then, is upon plaintiff to prove that when the managing officers of the Central Bank entered into their engagement with plaintiff they knew

that the Bank was hopelessly and irretrievably insolvent, must presently close its doors, and that it would not pay plaintiff the money it collected. The burden is heavier than in the ordinary case, for the sole foundation of plaintiff's case is a charge of fraud. "Fraud," said Mr. Justice Story, "is not presumed. It must at law be clearly and fully established. Suspicion is not enough. Doubtful circumstances are not enough. The balance of the testimony is not to be nicely weighed." *Sanborn vs. Stetson,* 21 Fed. Cas, 314. "Fraud," said Judge Bean in *United States vs. California Midway Oil Co.,* 259 Fed., 343, "is never presumed, but must be established by clear, unequivocal, and convincing proof. Proof which merely creates suspicion is not enough." "Where fraud is alleged it must be clearly and satisfactorily proved by him who alleges it." *Pederson vs. Ry. Co.,* 6 Wash. 202. Fraud cannot "be found upon a bare preponderance of the evidence." *German-Am. Bank vs. Illinois S. Co.,* 99 Wash., 9. The rule is that fraud must "be proved by testimony at once strong, cogent, and convincing." *Morris & Co. vs. Canadian Bank,* 95 Wash., 418. Where circumstances are relied upon to prove fraud, they are not sufficient unless they are inconsistent with honesty, and only consistent with an intent to defraud. If they are of equivocal tendency, as consistent with honesty as dishonesty, fraud is not proven. *Foster vs. McAlester,* 114 Fed. 145; *In re Hawks,* 204 Fed. 309; *United States vs. California Oil Co.,* 259 Fed., 343; *Dunlap vs. Seattle Nat'l Bank,* 93 Wash., 568; *Dart vs. McDonald,* 107

Wash., 537. There is not a scintilla of evidence tending to prove that on the 21st the managing officers of the Central Bank knew it to be hopelessly and irretrievably insolvent, and were aware that in undertaking the collection of the check they were perpetrating a fraud upon plaintiff. The Bank was insolvent, and six days later was forced to close its doors, but those facts, standing alone, do not tend to prove guilty knowledge on the part of its managing officers. They knew that the Bank was having difficulty in maintaining its cash reserve, and probably understood that if conditions did not change and it received no outside aid it might not be able to weather the storm. But they had these resources to look to: (1) The proposed sale; (2) The expected crop movement in February and March; (3) The promised deposit of $50,000 in county funds in February; (4) The continued assistance of the Trust Company. It is of no moment that their hopes and expectations were not realized. If they honestly hoped or expected that the Bank's shortage of ready money would be relieved through these or any one of these avenues of relief, and it would be able to continue business, there was no fraud in the transaction with plaintiff. The evidence permits no doubt that on the 21st they honestly believed that the Bank was in no danger and would continue business indefinitely.

III. *Conceding the existence of a trust relation, the money collected cannot be followed as a trust fund because it was commingled with the funds of the Central Bank, and did not augment its assets.*

To recover in this case, plaintiff must do more than establish a trust relation between it and the Central Bank. It must also show that the money collected augmented the assets of the Central Bank, and can be traced and identified, separate from the funds of the Central Bank. The evidence fails to show this.

For a considerable time (the period is not definitely fixed) the Central Bank had carried an active account with the Trust Company. From day to day, practically every banking day, it would send the Trust Company drafts, checks, and other cash items, to be credited to its account. Also as it needed money it would send notes for rediscount, the amount of which, if accepted, would be credited to it. The magnitude of such transactions is shown by the fact that in October, 1920, it sent the Trust Company cash items (excluding notes or rediscounts) amounting to $421,000; in November, $317,000; in December, $156,000; from the 3d to the 26th January, $151,000; a total of over $1,000,000 for the four months. (Trans., 142.) During January alone it had rediscounts with the Trust Company ranging from $142,000 to over $200,000. (Trans., 118.) The Trust Company was its principal correspondent, more than half of all the drafts it issued being drawn upon the Trust Company. (Trans., 90, 97-98.)

As has been heretofore stated, when the Central Bank received the collection items from the Seattle National Bank, it placed with them other items it held against other Yakima banks, the total exceeding $58,000, and through the Yakima Valley Bank presented them all for clearing. From the amount received through these collections, there was deducted the amount of items presented against the Central Bank, some $9,000, so that the Yakima Valley Bank actually received but $49,500 from the $58,000 in collection items. The Central Bank left $1,500 of this amount on deposit with the Yakima Valley Bank, and sent $48,000 to the Trust Company for credit to the Bank's general account. Before the presentation of the $51,000 draft which the Central Bank sent to the Seattle National Bank in settlement of the collection items received from it, the Trust Company had paid out of the $48,000 remittance a considerable number of prior drafts drawn by the Central Bank upon its general account, so that but $24,000 remained to the credit of the Bank. When it was decided not to allow the overdraft which would have been necessary in order to pay the $51,000 draft, this balance was applied upon a debt which the Central Bank owed the Trust Company.

It is settled law in the State of Washington that in order to recover a trust fund from an insolvent bank two things must concur; the assets of the bank must have been augmented by the receipt of the trust fund, and it must be capable of identification and segregation from the funds of the bank. In *Blake*

vs. State Savings Bank, 12 Wash., 619, 41 Pac., 909, a depositor sought to recover deposits made by him after the bank had become hopelessly insolvent, and was known by its officers to be so. It appeared that the deposits had been received, credited to him, and checked against by him, in the usual way, having thus entered into and become a part of the funds of the bank. It was held that as the "deposits became commingled with the general funds of like character in the bank the means of identification failed and the money could not be reclaimed."

It is evident that the money collected on plaintiff's check was so commingled with the general funds of the Central Bank as to lose its identity. It was put through the Yakima clearing house with all the other checks the Central Bank had for collection on the 21st, a total of over $58,000. In collecting these checks there was deducted from their amount $9,000 on account of checks drawn on the Central Bank and put through the clearing house on the same day. The balance of $49,500 went to the credit of the Central Bank with the Yakima Valley Bank. The Central Bank then drew out $48,000, put it with other funds, and sent the whole to the Trust Company for credit to the general account of the Central Bank. There it was mingled with other funds which had been, and thereafter were, transmitted for credit to the Central Bank, and was subject, and was subjected, to drafts drawn generally against the account of the Central Bank, and to charges on account of overdue rediscounted paper. There was certainly a commingling

of funds and loss of identity equal to that appearing in the Blake Case.

Heidelbach vs. Campbell, 95 Wash., 661, 164 Pac., 247, is not a bank case, but is squarely in point on the effect of commingling funds. Goods were sent to a merchant to be held by him in trust, with the privilege of sale and requirement of accounting to the owner for proceeds of sales. Some of the goods were sold, but the trustee did not keep the proceeds of the sales separate from his funds. Instead he commingled them therewith, and used them in payment of employes and other running expenses, in paying his creditors, and in the general operations of his business. It was held that the trust fund had lost its identity and could not be traced.

In the case at bar there is the same commingling as in the cited case. The Central Bank put the proceeds of the collection with its general funds, and used them in payment of its debts.

The Washington cases heretofore cited have denied the right to recover a trust fund because it was commingled with the funds of the trustee. Those hereinafter cited deny the right because there was no augmentation of the assets of the trustee. In *Rugger vs. Hammond,* 95 Wash., 85, 163 Pac., 408, the owners of bonds authorized their sale and the remittance of their proceeds to a designated bank. One of the owners instructed the bank to use his portion of the proceeds, when received, for a particular purpose. The bank did not do so, but so disposed of them that

they were lost to the owner. He sought to follow the money as a trust fund in the hands of the bank's receiver. Denying him that relief, these rules were stated by the Court: (1) In such a case, a question of title to property, not of debt, is involved, and the claimant cannot prevail unless he can trace his property into the possession of the receiver of the insolvent bank; (2) The burden of proof is upon the claimant, and "it must clearly and satisfactorily appear that his money or property sought to be recovered is actually, in its original or substituted form, in the hands of the successor of his trustee;" (3) There could not be a recovery without showing that the bank's assets were augmented by the reciept of the trust fund; (4) The fact that the money was deposited with the bank, and was mingled with its funds and used in the usual course of its banking business, was insufficient to establish an augmentation of its assets.

Next in order is *Zimmerli vs. Northern Bank,* 111 Wash., 624, 191 Pac., 788. There bonds secured by a mortgage on realty were executed to a trust company. It sold two of the bonds to plaintiff. Subsequently a purchaser of the realty paid the entire mortgage debt to the trust company, which thereupon satisfied the mortgage, but did not pay the amount of his bonds to plaintiff. The purchaser of the property and plaintiff were both depositors with the trust company, and the mortgage debt was paid by a check drawn upon the purchaser's account with the trust company. The trust company became insolvent, and

plaintiff sought to establish that the money paid in satisfaction of his bonds was a trust fund, and to recover it from the company's liquidator. It was held that there had been no augmentation of the bank's assets, and therefore there was no trust fund.

In *Spiroplos vs. Scandinavian-American Bank,* 116 Wash., 491, 199 Pac., 997, we have a case that cannot in any way be distinguished from the case at bar. On the 12th January, 1921, the plaintiff bought from the defendant bank a draft upon the National Bank of Greece. Neither the defendant nor its New York correspondent was a correspondent of the Greek bank, so to provide funds for the payment of the Greek draft, the defendant drew a draft for the same amount upon its New York correspondent in favor of the New York correspondent of the Greek bank. The money paid by the plaintiff for the Greek draft went into the defendant's general funds. Three days after the purchase of the draft, on the 15th, the bank commissioner (examiner) declared the defendant to be insolvent, and took charge of its affairs for liquidation purposes. When the draft was drawn, the defendant had a sufficient balance with its New York correspondent to pay the draft, but after it closed its doors the New York correspondent refused to pay the draft and applied the balance on claims it had against the defendant. The plaintiff thereupon sought to establish the money he paid for the draft to be a trust fund, and to recover it as such. It was held that he could not recover because there had been no

augmentation of the defendant's assets. Quoting from the opinion:

> "It may be assumed that Spiroplos' money passed into the hands of the receiver in a substituted form, but the more serious question is whether it increased the net assets of the bank. The receiving of money on deposit by a bank does not ordinarily swell its assets because it creates a debt of the bank to the depositor equal to the amount of the money so received. In the *Rugger* case it was said, speaking of the money there involved:
>
> 'True this money in a sense went into the assets of the trust company, but so does all money which is deposited in a bank, since title thereto passes to the bank. It is not enough, however, for our present purpose that the money physically became a part of the trust company's assets, it must have actually swelled the net assets of the trust company and passed in some form to the hands of the receiver. Manifestly the receiving of money on deposit by a bank does not ordinarily swell its assets, for it creates a debt of the bank equal to the amount so received.'
>
> The question then arises whether, when the bank received Spiroplos' money and issued the draft, it created an obligation on the bank equal to the amount of money so received. If it did, the rule of the cases just cited would control."

The Court then considered that question, and held that when the bank issued its draft it incurred a debt to plaintiff, and the "net assets of the bank were not augmented by the transaction."

The rule stated in the Spiroplos Case has been somewhat weakened by the opinion in the later case of *Raynor vs. Scandinavian-American Bank,* 22 Wash.

Dec., 46. The Spiroplos Case required that there should be an augmentation of the net assets of the bank. The Raynor Case held it was suffiicient if the gross assets were augmented. Both are department decisions, and at the time of writing this brief the Supreme Court, sitting *en banc,* has not harmonized them. In view of that situation, we shall not remark upon either, but shall pass to the Federal decisions.

In *City Bank vs. Blackmore* (C. C. A. 6th Circ.), 75 Fed., 771 (opinion by Judge Taft), the City Bank sent a New York draft for $5,000 to the Commercial Bank, for credit to the account of the City Bank. The Commercial Bank was then hopelessly insolvent, due to the dishonesty of its cashier and managing officer, and closed its doors three days later. Upon receipt of the draft the Commercial Bank sent it to the National Bank of the Republic, at New York, which credited the draft against a debt due it from the Commercial Bank. The City Bank sued to establish and recover the amount of the draft as a trust fund, asserting that a trust relation existed because of the hopeless insolvency of the Commercial Bank, known to its managing officer, when it received the draft. It was held that although a trust relation existed, there was no trust fund to be recovered unless it appeared that the assets of the Commercial Bank were increased $5,000 by the credit given it on the books of the National Bank of the Republic, or unless the claims against the Commercial Bank were decreased $5,000 by reason of the credit, so that there was $5,000 more for distribution among its creditors.

That, of course, did not appear. The Commercial Bank received $5,000, but incurred an indebtedness to the City Bank of the same amount. It used the $5,000 to pay a previously existing debt to the National Bank of the Republic. At the end of the transaction it was financially where it was at the beginning. Its assets had not been increased or its debts decreased by one dollar. The lessening of its debts to the National Bank of the Republic had been offset by a similar increase of its debt to the City Bank; in other words, there was merely a substitution of one creditor for another. It was therefore held the City Bank could not recover.

The similarity of the cited case to the case at bar is striking. The Central Bank received $48,000 in money and in doing so incurred an indebtedness exceeding that amount. It used the money so received to pay previously existing indebtedness, the result being that through the transaction it did not add one dollar to its assets or decrease its indebtedness by one dollar. Nothing more was accomplished than to pay one creditor by incurring an indebtedness to another.

In *Empire State Surety Co. vs. Carroll County* (C. C. A., 8th Circ.), 194 Fed., 593, many different questions concerning trust relations and trust funds were involved. Among other things, it was held that "the deposit of checks of third persons which are credited to the depositor and used by the bank to pay its debts bring no money into its fund of cash and form no

foundation for preferential payment to the depositor" —citing *City Bank vs. Blackmore, supra.*

In *Wuerpel vs. Commercial Bank* (C. C. A., 5th Circ.), 238 Fed., 269, a mercantile house assigned an account against a customer to a bank as collateral security for a debt owing to the bank. The customer paid the account to the mercantile house, which thereupon used the money in paying creditors other than the bank. The mercantile house becoming insolvent, the bank sought to establish and recover the amount of the account as a trust fund. It was held that there could be no recovery because the insolvent estate was not augmented by the fund sought to be recovered. Quoting from the Court's opinion (pp. 274, 277):

> "It is not claimed that the proceeds of the draft went into the purchase of new goods, but, on the contrary, that they went entirely to reduce existing obligations. That this was a benefit to the bankrupt is obvious. The test, however, is whether it was of interest to the general creditors, by swelling the fund or assets that came to the trustee for distribution among them. If new goods had been bought by the bankrupt with the proceeds of the draft, which went into its general stock, and presumably remained there till surrendered to the trustee, or if there had remained, at all times till bankruptcy intervened, a balance to the credit of the bankrupt, at any or all of the banks with which it did business, an amount in which the proceeds of the draft might be represented, an augmenting of the assets that came to the trustee would be shown. The stipulation and record affirmatively show that no such use was made of the proceeds of the draft, but that, on the contrary, they were used exclusively to pay existing obligations, and added

nothing to the property or money that went to the trustee in bankruptcy.

* * * * * *

The general doctrine that the estate in insolvency must have been augmented by the fund sought to be recovered is well settled, and seems not to be disputed. Its application to the facts of this case is the disputed question. The authorities cited are most in point upon the proper application of the rule to the facts shown by the records. Following them, we think that the record affirmatively shows that the insolvent estate, which was to be administered in bankruptcy for the benefit of the creditors of the bankrupt, did not profit from the proceeds of the converted draft in any respect, and that when this affirmatively appears the injured or defrauded party is no more than an unsecured creditor, entitled to no priority, since it is not the character of the wrong done him alone, but also the fact of advantage received by other creditors thereby, that entitles him to such priority."

In *Knauth vs. Knight,* 255 Fed., 677, an insolvent firm daily overdrew their account with a bank in large sums. These overdrafts were secured by pledged collaterals, and at the close of the day's business the firm would deposit enough money to cover the day's overdrafts. The money necessary for that purpose was obtained from plaintiffs (among others) by the issuance of fictitious bills of lading, which were attached as security to drafts which were discounted or sold. Plaintiffs elected to rescind the fraudulent transactions by which their money was obtained, and sought to follow as a trust fund the securities which the bank held as collateral for the overdrafts, and which, after the bank's claim had been satisfied, had

been turned over to the trustee in bankruptcy of the insolvent firm. On the plaintiffs' appeal from an adverse decision below it was said:

> "It is the theory of appellants that the money obtained from them went to reduce the indebtedness of the bank secured by the collaterals pledged, and therefore the bankrupt estate was to that extent enriched and a trust created in their favor on the said property. The District Court found against this contention, holding that while appellants' money went to pay an overdraft which was secured by a lien on the property pledged, and reduced the secured indebtedness of the bankrupts to the bank, it also had the effect of enabling the bankrupts to increase their indebtedness of like character and amount on the succeeding business day; therefore the estate was not enriched for the benefit of the general creditors. This holding was correct. It is evident the money went to pay pre-existing debts, and did not increase the free assets at all."

The rule stated in the above decisions is clear cut. A trust fund is only recoverable when it appears that the insolvent estate has been augmented by it. It must appear that the estate in which the insolvent's creditors will share has actually been enriched by receipt of the fund, and that they will receive so much the more because of it. If the trust money has not swollen the estate; if, at the time that actual insolvency occurred and the estate was taken over for the benefit of creditors, the estate was no greater than it would have been had not the trust money been received, it is not recoverable. Apply the rule to the case at bar. Through the collection of plaintiff's check the Central Bank received $47,000, but the money was immedi-

ately used in paying the Bank's debts, so that none remained in its hands when its doors were closed. Now, while the Bank's debts were reduced by $47,000 through this use of the money, yet the estate was not augmented, for it became liable to pay plaintiff the $47,000 which was used in paying other creditors. It is apparent that there was, as in *City Bank vs. Blackmore, supra,* a mere substitution of creditors, and that the assets of the Central Bank were not increased by one dollar through the transaction with plaintiff.

The questions considered and decided in the foregoing cases seem never to have been squarely presented to this Court. Its decisions, however, are in harmony with the cited cases, and forbid a recovery in this case. In *Titlow vs. McCormick,* 236 Fed., 209, a national bank on several different occasions received trust funds, which it deposited to its credit with other banks. The balances in its favor thus created were exhausted by checks drawn upon them in the regular course of business, save a small balance which remained with one of the depositaries. When the trustee bank closed its doors, it had money on hand and on deposit with reserve and other banks which far exceeded the amount of the trust funds. It was held that the *cestui que trust* was entitled to the small balance which remained with the one depositary, but that the remainder of her money had lost its identity by reason of its use in the trustee's business operations prior to the time it suspended payment. In *United States National Bank vs. City of Centralia,* 240 Fed., 93, it appeared that the bank had received

$50,000 of the city's money under such circumstances as to make the bank a trustee thereof. The bank deposited the money to its credit with a bank in Seattle. The Seattle bank applied $11,000 of the money upon an overdraft of the trustee bank, and used $12,000 in payment for some notes it had rediscounted and charged back to the trustee bank when they became due. The remainder of the money was transferred, upon the order of the trustee bank, to a bank in Tacoma, where it was either applied upon indebtedness of the trustee bank or paid out on drafts drawn by it. When the trustee bank suspended payment it had on hand considerably more money than the amount of the trust fund. This Court held that the trust fund had been dissipated, had lost its identity, through its use in the trustee's business, and that the city could not recover.

Those same conditions are present in this case. Before the Central Bank closed its doors, all the money received from the collections involved had been used to meet its business engagements, in payment of its drafts and general indebtedness. Why shall not the rule that prevailed in the cited cases prevail here? The fact that in those cases the trust funds were sought to be traced into the hands of the trustee bank's liquidator, while here the fund is sought to be traced into the hands of a bank with which it had been deposited, does not differentiate the cases. In cases of this character, the plaintiff does not sue to recover upon a debt, but to recover property, specific money, of which he claims ownership. *Rugger vs. Hammond,*

supra (95 Wash., 85), and cited cases. The money has always passed out of the trustee's hands, and the plaintiff cannot recover it unless he can identify and trace it, either in its original or a substituted form, into the hands of the person from whom he seeks recovery. *Titlow vs. McCormick, United States Bank vs. Centralia,* both *supra.* Usually that person is the trustee's assignee or receiver, but the principle governing the right of recovery is necessarily the same when recovery is sought from some other to whom the trustee is alleged to have entrusted the money. In neither case can the plaintiff recover unless he can identify his money in the defendant's hands. Now in the cited cases, this Court held that when a trust fund had been commingled with the trustee's funds, and had been used in the conduct of its business, paying its debts, etc., it lost its identity, and could be no farther traced. That occurred here. The Seattle National Bank sent a number of items, totalling over $51,000, to the Central Bank for collection. These items, together with a number of other items, amounting to over $7,000, which the Central Bank had received for collection from other sources, were bunched and put through the clearing house as a mass. While plaintiff's $47,000 check was the principal item, its right in the entire amount collected was no higher than the rights of the owners of the other items. Whatever loss or diversion occurred in the process of collection, it would necessarily share proportionately with the other owners. In making the collection through the clearing house, there were offset some

$9,000 in items drawn upon and payable by the Central Bank, so that it realized but $49,500 from the $58,000 collections it had. Of this sum, $1,500 was left on deposit with its clearing house correspondent, the Yakima Valley Bank, and $48,000 was sent to the Trust Company for credit to the account of the Central Bank. From this amount $27,000 was paid out on drafts drawn upon the Trust Company by the Central Bank; in other words, it was paid out on the Bank's order, in settlement of its every day business engagements. The remainder was used to balance a charge back of overdue rediscounted paper, this being authorized by the long standing arrangement between the two banks respecting rediscounts. Evidently no distinction can be made between the situation involved here and the situations appearing in the cited cases, especially in the United States Bank Case. We submit, therefore, that this case is ruled by them.

If we are right in the foregoing conclusion, the Court need not look beyond its own decisions. However, it will probably be claimed that the Central Bank was guilty of actual fraud in undertaking the collection of plaintiff's check, and that the Trust Company was cognizant of the fraud. The evidence furnishes not the slightest basis for such a claim, but if it were sustainable plaintiff would yet not be entitled to recover. The doctrine of augmentation of assets would still stand in the way, for if in receiving the money the Central Bank incurred an obligation of equal amount, if no more resulted than a substitution of one creditor for another, the assets

of the Central Bank not being increased nor its liabilities diminished by the transaction, there can be no recovery.

IV. *If all the preceding points are decided in plaintiff's favor, there was error in the amount awarded, plaintiff being entitled to no more than its proportion of the balance of the* $48,000 *remittance which remained in the hands of the Trust Company on the* 25*th.*

The Trust Company received the $48,000 remittance and gave the Central Bank credit for it on the 22d. The officers of the Trust Company were not informed of the source of the remittance or of the outstanding $51,000 draft until the 25th, when letters were received from Buckholtz telling of both. In the interim the Trust Company had paid $27,000 out of the remittance on drafts drawn upon it by the Central Bank. The District Judge refused to reduce the recovery by the amount of those payments, and gave plaintiff a decree for $45,000, that amount being arrived at by ascertaining the proportion which the amount of its check, $47,000, bore to the entire amount of the collection items, $51,000, sent by the Seattle National Bank to the Central Bank, and giving it a proportionate amount of the $48,000 derived from those items that the Central Bank had sent to the Trust Company.

If all the preceding points are held with plaintiff, yet there was manifest error in not reducing the

amount of its recovery by the amount of the drafts paid by the Trust Company before it was informed of the source of the $48,000 remittance. If the Trust Company did not know the remittance was a trust fund, but supposed it belonged to the Central Bank, it was certainly guilty of no wrong in paying out the money on the order (drafts) of the Bank. The situation is analogous to those which this Court considered in *Titlow vs. McCormick,* 236 Fed., 209, and *United States National Bank vs. Centralia,* 240 Fed., 93. There it was held that trust funds could not be followed which had been paid out upon checks or drafts drawn by the trustee bank upon the banks in which the money had been deposited.

The only possible justification for holding the Trust Company for the whole amount of the remittance, notwithstanding the payments it made therefrom on the drafts of the Central Bank, is to say that Buckholtz, though posing as an employe of the Bank, was in fact an employe of the Trust Company, put by it in the Bank to represent its interests; that by operation of law it is charged with knowledge of all that he knew; and that as he knew when the remittance was sent that it was a trust fund, which could not properly be used for any other purpose than to pay the $51,000 draft sent the Seattle National Bank, the Trust Company knew those things when it received the remittance. And that, we think, is the theory upon which the District Judge proceeded.

Any theory which is entitled to respectful considera-

tion must have a foundation of fact to rest on. This has none. The evidence is overwhelming that Buckholtz entirely severed his relations with the Trust Company when he went to Yakima, and that while he was in the Central Bank he was there solely as its employe. The bank examiner testified that in December he requested Barghoorn to put another man in Ellis' place, and that Barghoorn promised he would do so as soon as he could get a suitable man. (Trans., 63.) Barghoorn testified that in compliance with the examiner's request he looked around for a man to take Ellis' place; that he asked the officers of the Trust Company to recommend some one, and they recommended Buckholtz; that when he employed Buckholtz it was understood that if Buckholtz proved efficient he would take Ellis' place as soon as it could be done without making trouble; and that Buckholtz was employed absolutely as an employe of the Central Bank, and was paid by it. (Trans. 49-50.) Mr. Rutter and Mr. Triplett testified that Barghoorn came to them, saying that he desired to make a change in the management of the Central Bank, and requesting them to recommend some one for the place; that, among several others, they recommended Buckholtz; that at Barghoorn's request they sent Buckholtz to him, and were later told that they had agreed on terms; that when Buckholtz went to Yakima he quit the employ of the Trust Company, completely and absolutely, and during the time of his connection with the Central Bank he was in no way, shape, manner or form, an employe or agent of the Trust Company, with the

single exception that, under circumstances hereafter to be referred to, rediscounted paper was sent to him personally for attention at maturity instead of being entrusted to the Bank. (Trans., 121-122, 101-102.) All this is amply confirmed by Buckholtz, who testified that when Barghoorn employed him it was understood that he was eventually to succeed Ellis; that when he went to Yakima he completely severed his relations with the Trust Company, and entered the employ of the Central Bank; that Barghoorn told him that his principal duties at first would be with the credit department and looking after the rediscount dealings with the Trust Company; that after he got in the harness he found it very inconvenient to have the rediscounted paper in Spokane when it fell due, as the borrower would come in to pay, renew or reduce, or give security, and nothing could be done because the paper was not there; that he therefore arranged with Triplett to send the rediscounted notes as they approached maturity to him personally, in his individual capacity; that he was paid nothing by the Trust Company for handling such paper, it being for the benefit of the Central Bank as well as for the accommodation of the Trust Company; and that during the entire time of his connection with the Central Bank he was solely and entirely employed by it, and that he was in no way a representative of the Trust Company, save in the handling of rediscounted paper, as heretofore stated. (Trans., 126-128.)

Presumably Messrs. Rutter, Triplett and Buckholtz are gentlemen of integrity and high standing in the

community in which they live, else they would not occupy the positions they do. It is inconceivable that men of such stamp would deliberately perjure themselves concerning a matter in which they have no interest save such as attaches by reason of their being officers and employes of the Trust Company. But if it is imagined they would be willing to do so, what about Barghoorn? He ceased to be a director of the Trust Company in January, 1921. Doubtless he had a kindly feeling for the Trust Company while it was advancing money to keep the Central Bank going, but unless he differs from the generality of mankind, the feeling would not survive its refusal to pay the $51,000 draft. At any rate, he has not the slightest interest in this suit, and yet, if the theory under discussion is accepted, he perjured himself as deliberately and thoroughly as, to sustain the theory, it must be assumed that Messrs. Rutter, Triplett and Buckholtz did. Reason balks at the notion of such wholesale purposeless perjury.

But in this as in other instances the correspondence between Buckholtz and Messrs. Rutter and Triplett is the best evidence against the view accepted below. These letters were put in evidence by plaintiff. They were written when there was no occasion to distort or color, and unquestionably express the real sentiments of the writers. They permit no doubt that Buckholtz' position was precisely what the testimony describes it to have been: an employe of the Central Bank, working in its interest, and unhampered by any tie, save that of sentiment, to the Trust Com-

pany. The tone of the correspondence is not, of course, that which would be found in letters passing between mere acquaintenances, or between persons dealing at arm's length. There was a warm friendship between Buckholtz and the officers of the Trust Company, especially Triplett, between whom and Buckholtz nearly all the letters passed. Doubtless Buckholtz also had a sentimental regard for the Trust Company as an institution. It was his business Alma Mater. He had entered its service as a boy, and had worked for it all his life save on two occasions when it had offered him opportunities for service with smaller banks, where promotion might be more rapid. Moreover, he knew that Barghoorn, his employer, was not dealing at arm's length with the Trust Company. Barghoorn had been a director of the Trust Company for 13 years, not severing that connection until the middle of January, 1921. He was depending almost entirely on the Trust Company for assistance through the financial depression, and it behooved him to deal most frankly and fairly with it. It was much dissatisfied with the manner in which Ellis had handled the rediscounts, and one of Barghoorn's incentives in employing Buckholtz was to get a man in charge of the redisocunts who knew the kind of paper that would be acceptable to the Trust Company, and who would handle the rediscounts in a manner satisfactory to it. (Trans., 49.) Such being the relation between Barghoorn, the head of the Central Bank, and the Trust Company, there was no reason why Buckholtz should not follow his natural inclination and

write to the officers of the Trust Company with the utmost frankness, and in the vein of friendliness which their former and present relations made natural.

The weight of these letters as evidence cannot be properly appreciated unless they are read in their entirety. However, excerpts from them will give some notion of their character, and show the desirability of carefully considering them as a whole. After reading them doubt cannot be entertained that, however friendly the relations between the writers and between the two banks, there were distinctly two parties to the transactions involved: the Central Bank and the Trust Company; that Buckholtz represented the one just as certainly and definitely as Messrs. Rutter and Triplett represented the other; and that on both sides, the one as much as the other, the respective banks were faithfully represented by their representatives, albeit with a decent regard, each for the rights of the other, and without desire to overreach or impose upon. The very first letters that passed fairly indicate the positions and spirit of the writers. Writing Triplett on the 6th January, Buckholtz sent him a note for $11,000, concerning the liquid character of which both he and Triplett evidently knew something, and of which they entertained doubts. Buckholtz said: "Don't swear but I want you to take this over and credit account of this bank if you can get it through." There followed a statement of a number of reasons, from Buckholtz' standpoint, why the Trust Company should accept the note and credit its amount to the Central Bank, and the

letter concluded with "I hope you will plug your darndest on this." (Trans., 142-143.) Under date of the 8th Triplett replied, saying that "I did my darndest to get it over for you," but that the excutive committee would have none of the note. "They feel that you have other paper down there which is more liquid, and which comes nearer measuring up to our standards. We have great confidence in your ability to pick out the kind of notes we want, and will ask that you work along those lines instead of asking us to take the Franc note." (Trans., 145-146.)

On the 8th Triplett wrote Buckholtz concerning a number of drafts, drawn against shipments of apples in transit, for which the Central Bank had been given credit, and which had remained unpaid for so long that the Trust Company desired something done about them, at the same time saying that one of them had been charged back to the Bank. (Trans., 147.) Replying, Buckholtz told of things he had in prospect to reduce the amount of the long standing apple drafts, saying that "If you can possibly carry this a week or ten days longer, I sure will appreciate it," and that "You might mention to Mr. Rutter that your risk on the apple drafts in transit is not bad, not nearly as bad as it might be." (Trans., 149-151.)

It will be recalled that it was desired, for the benefit of both parties, that as any pledged or rediscounted paper approached maturity it should be sent to Yakima, so there would need be no delay in its payment, reduction or renewal, or the giving of security there-

for, and that after Buckholtz went to Yakima it was arranged that such paper should be sent to him personally, and that he should be personally responsible therefor. Writing to Triplett under date of the 21st concerning the difficulty the Central Bank was having to maintain its cash reserve, he suggested as one way out of the difficulty that as "collections are made on notes hypothecated, to keep the money here and give you something else," although he at the same time recognized that "the collateral will in this way become more and more of an undesirable nature, but I will keep it in as good shape as it is possible to do." He closed by saying that "unless you insist, we will continue to hold what few pennies we might collect on your collateral notes and substitute other stuff, which I trust you will O. K. for the present." (Trans., 220-222.) Triplett flatly declined to permit that to be done, saying that "Your method of handling the collateral notes, while satisfactory from your standpoint, is not so satisfactory to us, for the reason that our collateral will keep getting more and more shoddy as time goes on." The remainder of the letter was taken up with what the Trust Company was willing to do to help out the cash reserve situation, the tenor of which was that while the Trust Company's feeling was "the most friendly in the world," and it was willing to assist the Central Bank to any reasonable extent as long as the security was reasonably good, it did not purpose getting into a situation where it would have to sustain a loss. (Trans., 224-226.)

On the 23d Buckholtz wrote a very long letter to Mr. Rutter, going into the condition of the Central Bank very thoroughly and stating his various plans for relieving the cash reserve situation and ultimately paying off its indebtedness. If these failed he saw only one other "avenue of relief:" to "whip up some of the stuff you are holding as collateral into rediscounts and substitute a poorer class of security." He requested Mr. Rutter to "write me a letter stating whether or not you will back the institution and myself any further in case of necessity." He dilated upon the advantageous location and the future business and earning power of the Central Bank, and declared that "there is no doubt in my mind" but that if the present difficulties were surmounted the Bank it was his "positive opinion" that if the Trust Company and become "a valuable account." He returned to the subject in a postscript to the letter, saying that it was his "positive opinion" that if the Trust Company would continue its assistance, advancing such further requirements as might be needed, which would probably not exceed $50,000, it would get its money back much more quickly than it would if it permitted the Bank to close. (Trans., 229-232.) On the next day he wrote Triplett, referring to the Rutter letter, and again requesting an expression concerning "how the S. & E. feels about things here and whether we can expect you to honor our drafts if the overdraft should go up to $25,000 or a little more." Expressing his worry over conditions and his inability to take things as easily as some people, he said that he might

feel more at ease "depending more or less on the strength of your letters and Mr. Rutter's that you would back me up. You have taken on everything I have sent for rediscount it is true, but I haven't the nerve to send you any junk for that purpose and the overdraft keeps wearing and the paralytic circumstances here ride on me. The suspense is awful." (Trans., 232-234.)

The sincerity of these letters is manifest. There was no occasion for them to be otherwise. They permit no doubt that Buckholtz was solely and entirely an employe of the Central Bank, devoting himself wholeheartedly to its service, and under no other obligation to the Trust Company than such as arose from benefits received in the past and, probably, anticipation of future benefits which might result from a continuance of friendly relations with it. If Buckholtz was in the Central Bank merely as an employe of the Trust Company, his only purpose in being there to see that for every dollar it advanced the Bank it received paper of equal amount and unquestionable value, why should he have felt any concern over the affairs of the Bank? Why should he have been so anxious to know whether the Trust Company would "back the institution and myself any further in case of necessity?" Why should he have so strongly urged upon it the desirability of continuing to assist the Bank, although in so doing it might be required to advance $50,000 or more additional and take "a poorer class of security?" Why should he have felt that "The suspense is awful" while waiting to hear from

Messrs. Rutter and Triplett whether the S & E would "back me up?" Why should he, during the entire time of his connection with the Central Bank, have been interceding in its behalf with the Trust Company; now endeavoring to persuade the latter to accept the $11,000 Franc note, now asking it to carry the long standing apple drafts as a credit for a while longer, now urging it to let the Bank retain the money collected on the rediscounted or hypothecated notes and put other notes in its stead? There can be but one answer to these questions. Buckholtz had no connection with the Trust Company but was solely an employe of the Bank. As soon as the critical period was past he expected to succeed Ellis as cashier and manager of the Bank, a much better position than he had held with the Trust Company. It was natural that he should be interested in the Trust Company continuing its assistance and carrying the Bank over the critical period, wherefore his exertions to bring that result about.

Another feature of the Buckholtz letters is equally convincing, making it clear that Buckholtz expected to remain with the Central Bank and become its head, provided a sale was not made, in which event he assumed that Ellis would retain his position. This feature is the interest he took in the management of the Bank, his criticisms of it and plans for betterment. In a gossippy letter to Triplett on the 10th, written as soon as he had had an opportunity to size up conditions, he spoke severely of the slovenly manner in which the work was done. The staff, he thought, was

too large, and with one or two exceptions was inefficient. "I would like to fire the whole gang out of here and get new people, all except Lemon and the old maid," but "it would not be wise to make any changes just now of course and we will have to poke along." If a sale did not go through, so that he remained there, "I am going to relieve one employe or give him notice to get another job. Haven't decided on who it will be. In fact, if business doesn't pick up and deposits remain below $500,000 we could weed out two of them if the others would spruce up a little." The business had been mismanaged, various particulars being pointed out, but its future was promising. "The force could be cut down somewhat and the institution would make very good profits even if deposits remained at $500,000, or less, in less than two years it would earn enuf to charge off everything slow." He concluded by saying that "there's no use crying about spilt milk; there is lots of it spilt and we have to mop it up the best we can." (Trans., 152-154.) Equally significant is a letter written to Triplett on the 18th, in which Buckholtz told of a heart to heart talk that he had had with Ellis. It seems that a construction company which owed some overdue notes to the Bank expected to receive a good sized payment on its work. Barghoorn knew it was expected, and told Ellis and Buckholtz to see that the Bank got some of it. The payment came in, but Ellis, whom Buckholtz had asked to fix up the matter, permitted the company to keep the money and renew its notes without reduction. This moved Buckholtz,

as he told Triplett, "to have a confidential talk with Ellis" and ascertain "how seriously he took my presence and position." The talk became somewhat heated, Buckholtz charging that Ellis "deliberately did the opposite of the policy and plans I had layed out to his knowledge and even at the request of Mr. Barghoorn" and that he (Buckholtz) wanted to know whether Ellis "was going to take my plans and policies seriously or not, and if he wasn't I wanted to know it right away." The conclusion of the discussion was that "we both agreed that it was desirable that he stay on the job for effect," Buckholtz adding that he hoped the proposed sale would go through, that he wished Ellis, whom he understood was to remain under the proposed new management, and the Bank every success in the world, but that in the meantime "there was no sense in the bank paying my salary and heavy expense if he was going to pull any more stunts over me like this one." (Trans., 184-191.) It is idle to say that Buckholtz would have taken such interest in the internal affairs of the Central Bank, and have been planning for changes and improvements in its affairs in the future, if he had been there merely as an employe of the Trust Company, not otherwise concerned with the Bank than to see that the Trust Company got ample security for every dollar it advanced to the Bank.

Another significant feature of these letters is that throughout Buckholtz unvaryingly and completely identifies himself with the Central Bank, and speaks of the Trust Company as an entirely independent third

party with whom he, as representative of the Bank, is dealing. The same feature will be observed in Triplett's letters, Buckholtz being invariably identified with the Bank and spoken of as its representative in all its transactions with the Trust Company. Omitting as far as possible letters which have been referred to in other connections, the following are some of the illustrations of such identification. Buckholtz, on the 7th: "Our O. D. with you increased about $1000 at this end today." (Trans. 145.) Triplett, the 10th: "Your account has been charged $329.89 to cover the discount" etc. (Trans., 151.) Buckholtz, 10th: "We had a nice day today with a gain of $13,000 in deposits * * *. The S & E account hasn't been reconciled for December * * * We don't know how we stand * * *. We should have a credit balance." (Trans., 156-157.) Buckholtz, 11th: "Kindly charge our account with the L. W. Adams $400 rediscount * * * we are crediting your account with $329.89. * * * Our remittance to you again was good and taking in consideration the float of our drafts, we should have a credit balance." (Trans., 159.) Buckholtz, 14th: "Please send us statement of our account with you with vouchers up to date." (Trans., 171.) Triplett, 19th: "Day after tomorrow your account will be charged with the six Associated Fruit Company drafts which have been outstanding for so long." (Trans., 192.) Buckholtz, 19th (writing concerning the Franc Inv. note for $11,000 which the Trust Company refused to take, but which, according to the records of the Bank, was

still in the possession of the Trust Company): "To confirm our records, kindly write us acknowledging receipt, or send collection receipt." (Trans., 194.) Triplett, 20th (replying to above): "We are holding the $11,000 note here for safe keeping for your account, and as some little protection to your overdraft." (Trans., 203.) Buckholtz, 19th (enclosing notes for rediscount): "I hope you can get this on the books without delay as we will need it to meet that $17,700 draft which will likely reach you Friday." (Trans., 197-198.) Triplett, 21st: "We are charging your account today as follows * * *. These have been entered for collection and will be credited to your account when and as paid." (Trans., 210.) Buckholtz, 21st: "Mr. Rutter has written me that we can expect no increase in deposits * * *. This theory is our only possible chance to liquidate our borrowed money * * *. It would naturally help our reserve * * *. I hope to gradually work down our rediscounts * * *. Our deposits for the last day or so have held their own quite well * * *. We will continue to hold what few pennies we might collect on your collateral notes." (Trans., 219-222.) Buckholtz, 23d: "It is reasonable to expect our deposits will remain above $400,000; in fact, we have hopes that they will hold up pretty well to where they are * * * say we drop to $400,000 during the next two weeks, with collections on stuff in our pouch here of perhaps $10,000, it will hit our reserve to the extent of $20,000 more * * *. We of course hope it will not be that bad * * *. More than $5,000 of

notes in our pouch here * * *. We being fortunate not to have a great lot of hay loans * * *. Confident of cutting down our borrowed money * * * We mailed a $51,000 draft drawn on you * * * and no doubt we will have a few dollars there to meet it * * *. If you do not pay it, we are gone * * *. We still have hope of a sale." (Trans., 228-232.) Buckholtz, 24th: "I cannot figure out any chance of keeping the balance in our favor outside of the methods outlined * * *. Whether we can expect you to honor our drafts * * *. I had hoped * * * would keep our overdraft covered * * *. That bunch of E. S. Small drafts * * * has put an awful crimp into us * * *. I don't know what we are going to do, unless the S & E will carry the institution thru * * *. We collected about $1,700—$1,000 of which went on your rediscounts." (Trans., 232-234.)

The foregoing excerpts are by no means all the expressions of that character which are to be found in the correspondence. They are taken haphazard therefrom to show its uniform tone. They suffice, we are confident, to prove that Buckholtz was not an employe of the Trust Company during the time he was connected with the Central Bank. These were not formal letters passing between two corporations, in which the writers submerge their personalities in the corporate entities. In each of them the individual spoke, and his personality was the more conspicuous because of the friendly terms upon which the writers were. If Buckholtz had been in the Bank as an em-

ploye of the Trust Company, concerned only with getting for it ample security for the money it advanced, and having no interest in the affairs and fate of the Bank, the letters could not have been expressed as they were. If he was not an employe of the Bank, and his allegiance was to the Trust Company, it is evident that in writing to the Trust Company of the affairs of the Bank there would have been a tone of detachment in speaking of them; instead of identifying himself with it and speaking as a part of it, he would have referred to it as a third party; his tone, in short, would have been that he was identified with the Trust Company, and that he was acting for it in its transactions with a stranger, the Central Bank. It is evident, also, that if the officers of the Trust Company had put him in the Bank to represent the interests of the Trust Company, and knew that his allegiance was to it, they would in their letters have identified him with it; would have spoken of what he was doing as being done for it, and of him as acting for it in his dealings with the Bank. There is no need to remark upon the hostility to such a notion of the tone of their letters as well as his.

We have these further suggestions to make in closing the subject of the letters, taking for their text the first letters and the last that passed between Buckholtz and the officers of the Trust Company. If Buckholtz had gone to the Central Bank as a representative of the Trust Company, employed by it to protect its interest and lay hold of the best security available, would he in his very first letter have asked

it to accept the $11,000 Franc Inv. note, which he knew, and knew the officers of the Trust Company knew, was not gilt-edged security? Would he have asked Triplett, as a personal favor to him, to try to have the note accepted, saying "I am doing this on my own initiative—not at the request or suggestion of S. B. (Sikko Barghoorn) or any one else, and I hope you will plug your darndest on this?" (Trans., 143.) Would the executive committee of the Trust Company, in declining to accept the note because they felt that the Central Bank had a better class of paper, have replied to their employe, whom they had put in the Bank to get the very best security to be had for the advances they were making, in such soft language as this: "We have great confidence in your ability to pick out the kind of notes we want, and will ask that you work along those lines instead of asking us to take the Franc note;"? (Trans., 146.) Would they not rather have asked why it was that he, their representative, had changed sides, and in the interest of the Central Bank was endeavoring to get them to accept paper which he knew to be undesirable? Go down to the last letters, those written on the 21st, 23d, and 24th. If Buckholtz was a representative of the Trust Company, why was it that he asked its officers to permit the Central Bank to retain the money collected on paper belonging to the Trust Company and give a poorer class of paper in its stead? Why was it he urged them to advance such further money as the Bank might require, running up to $50,00 or more, and take paper which he knew to be undesir-

able, if not doubtful? Why did he so strongly press upon them the advantageous location of the Central Bank, its brilliant future under proper management, and the valuable account that it would be if present difficulties were surmounted? Why was he so anxious to know whether the Trust Company would "back the institution and myself any further in case of necessity," and say that "The suspense is awful" while he was waiting its decision? (Trans., 231.) Turning to the other side, if Buckholtz was a stranger to the Central Bank, put there by the Trust Company to serve its ends, why did Triplett reply to his request that the Bank he permitted to keep the money collected on the Trust Company's paper and put other paper in its stead that "Your method of handling the collateral notes, while satisfactory from your standpoint, is not so satisfactory to us, for the reason that our collateral will keep getting more and more shoddy as time goes on?" According to the theory that prevailed below, Buckholtz was put in the Bank as an employe of the Trust Company, his employment being to get money for his employer and save it from loss at whatever cost to others. The employe made a proposition to his employer which involved the employer giving up money which had been collected for it and accepting a possible loss by taking doubtful collateral, for no other purpose than to benefit the Central Bank. And yet the employer made no other response to the employe than that while the proposition was satisfactory from *"your standpoint"* it was not satisfactory *"to us."* Why, pray, this difference in standpoints?

Why was it permissible for the employe to have a standpoint while engaged upon his employer's business which was perfectly satisfactory to him although eminently unsatisfactory to his employer? And why was it that the employer had no reprimand, no criticism, even, for the employe's adoption of a standpoint which was satisfactory to him although detrimental to his employer's interests? These, and other similar suggestions that might be made if space permitted, emphasize the impossibility of believing Buckholtz to have been an employe of the Trust Company during the time he was connected with the Central Bank.

In opposition to the positive testimony and the evidence of these letters what is there? Nothing but several circumstances, innocent on their face and requiring the aid of suspicion to give them a sinister aspect, and which are readily explainable. These circumstances are:

(a) That Buckholtz left the Trust Company to go to the Central Bank, and that as soon as the latter closed its doors he returned to the service of the former.

That had occurred before. Buckholtz is a young man, 28 at the time of the trial, and anxious to get on in the world. On two previous occasions he had left the service of the Trust Company for smaller banks, where promotion would be more rapid. Once he went to a bank in Idaho, where he remained for two years; another time to a bank in Oregon, where he remained for several months. On both occasions

he was taken back by the Trust Company as soon as he wished it. (Trans., 104, 125.) In the present case, the officers of the Trust Company had no desire to part with him. Barghoorn, one of their directors, told them that he must get another man as head of his Yakima bank, and asked them, as a favor, to recommend some one whom they believed to be fitted for the place. In recommending Buckholtz they were actuated by two motives: a desire to accommodate Barghoorn and to benefit Buckholtz, for they believed they were putting him in the way of a better employment than he could hope for, at least for years, if he remained with the Trust Company. (Trans., 50, 101, 126.) There was nothing unnatural or suspicious in their taking him back when the Central Bank closed. They would have been a poor lot if they had not done so. When the proposal that he go to Yakima was made Buckholtz, and he was informed that it originated with the officers of the Trust Company, he was hurt, thinking their motive was to get rid of him. It was only the assurances of their esteem, and that they had recommended him because they believed that it would be much to his advantage if he took the position, that influenced him to go. (Trans., 126.) Their own self respect, if any other consideration were wanting, would cause them to take him back when the hopes they had built up in him were dashed by the failure of the Central Bank. But there was also the consideration of interest to induce his re-employment. The failure of the Central Bank left the Trust Company with $185,000 to $190,000 of Yakima paper

on its hands and with no local institution or man to look after its interests. The times were troublous, and if this paper were not looked after closely by some interested person, who knew something of local conditions, there might well be a heavy loss on it. During his month's work in the Central Bank Buckholtz had obtained a fair conception of local conditions, and had familiarized himself particularly with this particular paper. Much of it had been recommended by him, and in running through his letters it will be observed that he had exerted himself to secure information concerning the resources and character of its makers. Knowing this, as soon as the Bank closed the Trust Company employed him to look after the mass of Yakima paper it held, remaining in Yakima for that purpose. (Trans., 103, 104.) The re-employment was perfectly natural, whether regarded from the standpoint of decent treatment of Buckholtz or of the Trust Company's self interest.

(b) That while Buckholtz was with the Central Bank paper pledged or rediscounted with the Trust Company was sent to him personally for collection or other attention.

That was in the interest of the Central Bank as much as of the Trust Company. Under the arrangement between the two banks, if the rediscounted paper was not paid or otherwise settled in a satisfactory manner at maturity it was charged back to the Bank. To permit the paper to go at loose ends, without prompt attention at its maturity, would have meant

that the Bank would be constantly hustling to get new paper forward to the Trust Company to take the place of that which had been charged back, or that its account would be continually and heavily overdrawn, a practice which, although considerable lenity in that respect had been shown the bank, was distasteful to the Trust Company, and which its executive committee had ordered to be discontinued. (Trans., 113.) It was of the utmost importance to the Bank, too, that its transactions with the Trust Company should be attended with as little friction and trouble as possible, and that the notes which it had pledged to or rediscounted with the Trust Company should either be paid at maturity or some settlement made which was satisfactory to it. The Bank was making heavy demands upon the Trust Company, and while the latter had shown a very accommodating disposition, it is self-evident that that spirit would not have long survived if the Trust Company were given much trouble with the collection or other satisfactory settlement of the paper it held. One of the causes for complaint against Ellis was the unsatisfactory manner in which he handled the rediscounting with the Trust Company, and it was partly in order to remove that difficulty that Barghoorn employed Buckholtz. (Trans., 48-49.) To accomplish one of the purposes of his employment, Buckholtz proposed to the Trust Company that as paper pledged to or rediscounted with it approached maturity, it should be sent to him, and that he would be personally responsible for it and give it the necessary attention to secure prompt

settlement. This, he says, was as much in the interest of the Central Bank as of the Trust Company, and it is manifest that it was. (Trans., 127.) He received no compensation from the Trust Company for what he did in that behalf, and it sent the paper to him because of his suggestion that it would be for the mutual benefit of the two banks, and because of its acquaintance with him it was willing to entrust the paper to him. (Trans., 103.)

(c) That on the day before the Central Bank closed, Buckholtz took away from the Bank a number of notes which he claimed belonged to the Trust Company, and which he refused to surrender to the examiner when the latter took possession.

Buckholtz permitted the examiner to examine the notes, and the latter testified that with the exception of one or two items which were taken by mistake the notes belonged to the Trust Company. (Trans., 59.) These had been entrusted to Buckholtz personally under the arrangement referred to above, they belonged to the Trust Company and neither the Bank nor the examiner had any right to them, and Buckholtz would have betrayed the trust confided to him had he not, when it seemed that the Bank must close, taken into his own custody the paper which had been entrusted to him personally, so that the title to and right of possession of it should not come in question because of the examiner seizing it.

(d) That on two occasions, once before the Bank closed and once just after, Buckholtz gave to a stran-

ger with whom he was conversing a business card which showed him to be connected with the Trust Company, and on one occasion his conversation indicated that he was so connected.

So far as the cards are concerned, the strangers had difficulty (not unnaturally) in getting his name, so he gave them cards. He had no other cards than the business cards he had while he was with the Trust Company, so used those. (Trans., 130.) So far as concerns the conversation, it was with an officer of one of the Yakima banks (Louden), who says that whatever was said about the Trust Company was merely by way of introduction. (Trans., 80.) Buckholtz testified that he went in to get Louden's ideas about crop movement and general conditions in Yakima, and introduced himself by saying he was over with the Central Bank, whereupon Louden said that he had heard some one was there from the Trust Company and inquired if Buckholtz were he, to which Buckholtz replied in the affirmative. (Trans., 129.) These incidents are so trivial as scarcely to merit remark. On the occasions that he gave the cards he was engaged in general conversation, to which it was utterly immaterial whether he was connected with the Central Bank or the Trust Company. He gave the cards to fix his name, not to identify himself with any institution, and it was perfectly natural that under such conditions he would use his old business cards when he had no other. As to the conversation, in introducing one's self to a stranger for the bare purposes of a short chat about local business conditions, one does

not usually consider it necessary to be minute and explicit about the details of one's history. A few words, just enough to show that one is warranted in taking up the brief time required for the conversation, is generally regarded as sufficient. When Buckholtz said that he came from the Trust Company and was over with the Central Bank he told the exact truth. But as he did not consider it necessary to go into details and explain that he had severed his connection with the Trust Company, and was with the Central Bank as an employe, Louden, assisted in reaching his conclusion by the card which was handed him, assumed that Buckholtz was still an employe of the Trust Company and was at the Central Bank on its business.

(e) That the letters which passed between Buckholtz and the officers of the Central Bank were very intimate in tone, and showed that Buckholtz relied considerably upon their advice and assistance.

It would have been very surprising had the tone been otherwise. Buckholtz was a young man, 27 or 28. Triplett and he were intimate friends and he had a high regard for Mr. Rutter, as the latter had for him. Practically his whole business life had been under the tutelage of those two men. He had entered upon a task in which they were interested through their friendship for him, their friendship for Barghoorn, and their natural desire that the institution they were assisting should pull through. As Buckholtz got deeper into his task he found it a difficult one. There had been mismanagement, the securities were not liquid,

Ellis, still the active head of the Bank, would not co-operate with him. In a time of falling prices, tight money and shrinking bank deposits, these made his task hard. There was no one in Yakima with whom he could talk. Barghoorn was in Yakima but three times in January; when he took Buckholtz over to install him, two or three days during the middle of the month, and on the 26th, when he went over to endeavor to save the Bank. In the intervals he was not in Spokane all the time; he made "some trips" out of there; he recalled one into Idaho and one to Colville, their duration not stated. (Trans., 51.) Buckholtz naturally turned, therefore, to his former superiors, for both his personal and business relations with them were such that he could speak freely of his troubles and solicit the advice and consolation that he desired. It is evident, too, that he was a bit homesick. He was alone in Yakima, living in a hotel, and without acquaintances save such business acquaintances as he had made in his short stay there. He spoke a number of times of working alone in the Bank until 11 and 12 o'clock at night. Under the conditions surrounding him, it would be strange if a young fellow of his age did not feel the need to write to and receive letters from his friends in order to keep up his spirits. His craving for friendly companionship, albeit through the medium of letters, is evidenced by the long letters he wrote in which he spoke in detail of all his doings, business and personal. It is evidenced, too, by his entreaties to Triplett to write him. "Keep writing me. I like to hear from headquarters."

(Trans., 151.) "Keep writing me. It's great to hear from home. It strengthens my morale and it is indeed a pleasure to pause for a moment thru the day and open and read them. I am going to use you all I can in this work, and knowing that you have plenty of other matters to look after, I appreciate the time you give me." (Trans., 170-171.) "I look forward to your letters as the event of the day and any encouragement and assistance or suggestions help a lot right at this time." (Trans., 237.) Those phrases are sufficient explanation of the tone and matter of the general correspondence.

Considered singly or collectively, the foregoing circumstances do not rise to the level of evidence. If they stood alone, unaffected by any other evidence, they would not be accepted as evidence that Buckholtz was in the employ of the Trust Company while he was in the Central Bank. They lead to no definite conclusion, and are on their face so susceptible of several interpretations, as to forbid that they should be accounted evidence of the particular fact to which they are adduced. It is too much to ask that they should be accepted as sufficient evidence to establish that four reputable gentlemen deliberately committed perjury, and to overcome the convincing evidence of the letters.

We pray that the judgment appealed from be reversed and the cause remanded with directions for dismissal. In the event that it is held that the Trust Company is not entitled to this complete relief, we pray

that the cause may be remanded with directions to ascertain the amount of money that had been paid out on drafts drawn by the Central Bank on the Trust Company prior to the receipt of the Buckholtz letters telling of the outstanding draft for $51,000, and that a decree be entered for only the amount remaining in the hands of the Trust Company after payment of such drafts.

Respectfully submitted,

F. H. GRAVES,
W. G. GRAVES,
B. H. KIZER,

Solicitors for Appellant,

Spokane & Eastern Trust Company.